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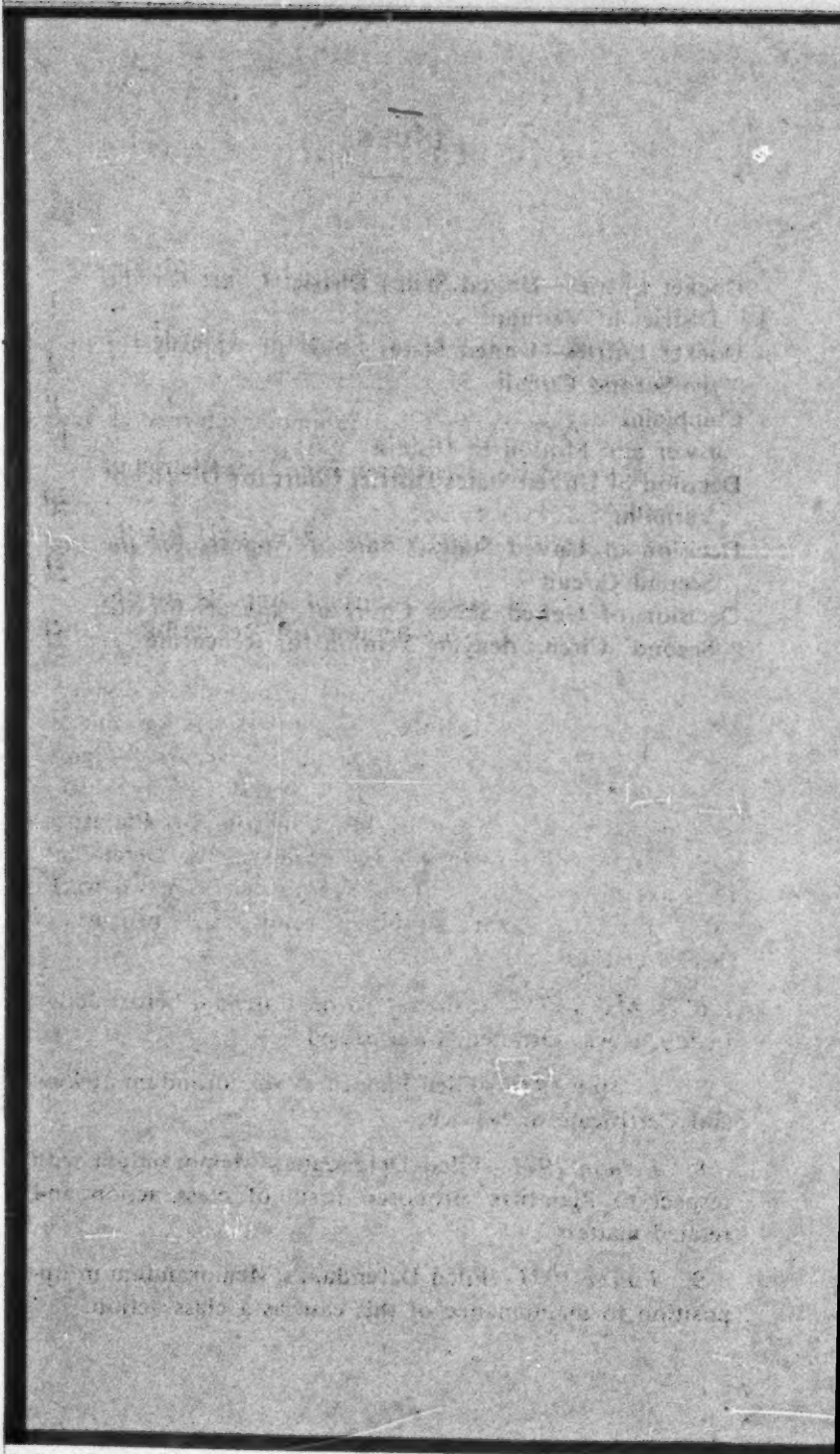


United States District Court

District of Vermont

Docket Entries.

1. *9 February 1971*—Filed Complaint. Issued summons and delivered same to Marshall for service.

2. *12 February 1971*—Filed Summons returned served.

3. *3 March 1971*—Filed Answer of Defendant and Certificate of Service.

4. *31 March 1971*—Filed Plaintiff's request for pre-trial conference.

5. *29 April 1971*—In Chambers, Pre-Trial Conference before Judge Leddy and hearing on affirmative defenses in Defendant's Answer. Peter Langrock, Esq. and Mark Sperry, Esq. for Plaintiffs; Henry Black, Esq. for Defendant (out-of-state attorneys present for Defendant; Taggart Whipple, Esq., Richard Nolan, Esq., and Frank Ferony, Esq.). Statements made to Court by Mr. Langrock for Plaintiffs, followed by Mr. Black and Mr. Whipple for Defendant. Decision reserved. Plaintiffs to submit briefs in two weeks (May 13); Defendant to submit reply brief two weeks thereafter (May 27).

6. *4 May 1971*—At the call of the Calendar before Judge Leddy, it was Ordered; Case passed.

7. *13 May 1971*—Filed Plaintiffs' Memorandum of Law and Certificate of Service.

8. *1 June 1971*—Filed Defendant's Memorandum with respect to Plaintiffs' proposed form of class action and related matters.

9. *1 June 1971*—Filed Defendant's Memorandum in opposition to maintenance of this case as a class action.

Docket Entries.

10. *30 September 1971*—Filed Letter dated June 16, 1971, from Taggart Whipple.

11. *30 September 1971*—Filed Opinion and Order—It Is Ordered that reference to all persons other than the four named plaintiffs is stricken from the complaint and that this action will not be permitted to proceed as a class action. Copy mailed to attorneys.

12. *12 October 1971*—Filed Plaintiffs' Motion to Modify order and certify question of Law to Court of Appeals and Certificate of Service.

13. *14 October 1971*—In Chambers before Judge Leddy, Peter Langrock, Esq., for Plaintiffs. Henry Black, Esq., Roger Pyle, Esq., Paul Carroll, Esq., and Richard E. Nolan, Esq., for Defendant. Hearing on Plaintiffs' Motion to modify Order and certify question of law to Court of Appeals. Statements made to Court by Mr. Nolan, followed by Mr. Langrock. ORDERED: Plaintiffs may have until Monday, October 18, 1971, to file brief and Defendant until Monday, October 18, 1971, to file reply brief. Decision reserved.

14. *15 October 1971*—Filed Defendant's memorandum in opposition to Plaintiffs' Motion to modify order and certify question of law to Court of Appeals.

15. *18 October 1971*—Filed Plaintiff's Memorandum of Law and Certificate of Service.

16. *20 October 1971*—Filed Defendant's letter dated October 18, 1971.

17. *21 October 1971*—Filed Amendment to Opinion and Order—Plaintiffs' Motion is granted. Amendment shall be an addition to and an intergral part of the Opinion and Or-

der in the above case filed September 30, 1971. Mailed copy to attorneys.

18. *22 October 1971*—Filed Defendant's Reply Memorandum with respect to Plaintiffs' Motion for Certification.

19. *1 November 1971*—Filed Plaintiffs' Notice of Appeal, Copy mailed to Langrock & Sperry, Esqs., Black & Plante, Esqs. & Davis, Polk & Wardwell, Esqs.

20. *9 December 1971*—Mailed record on Appeal to Clerk, U. S. Court of Appeals for the Second Circuit, New York, N. Y. Attorneys notified.

Docket Entries.

UNITED STATES COURT OF APPEALS

For the Second Circuit

1. *1 November 1971*—Filed petition for leave to appeal with proof of service.

2. *10 November 1971*—Filed order denying leave to appeal under 1292 (b).

3. *22 November 1971*—Filed motion for reconsideration of application for leave to appeal with proof of service.

4. *22 November 1971*—Filed motion for leave to file additional documents with proof of service.

5. *22 November 1971*—Filed copy of notice of appeal.

6. *24 November 1971*—Filed memorandum in opposition to motion to reconsider, etc. with proof of service.

Docket Entries.

7. *30 November 1971*—Filed order granting motion for leave to file additional documents in support of motion for leave to appeal.

8. *30 November 1971*—Filed order granting motion to reconsider and vacate order dated 10-10-71 denying petition for leave to appeal and to grant leave to appeal.

9. *10 December 1971*—Received record (original papers of district court).

10. *16 December 1971*—Filed record (original papers of district court).

11. *17 January 1972*—Filed motion for extension of time to file appellant's brief and appendix with proof of service.

12. *18 January 1972*—Filed order granting motion for extension of time to file appellant's brief and joint appendix to 2-8-72.

13. *4 February 1972*—Filed order extending time to file appellant's brief and joint appendix to 3-6-72.

14. *23 March 1972*—Filed stipulation and order (endorsed) extending time to file appellant brief and joint appendix to 3-10-72; appellee's time is extended to 4-24-72.

15. *24 March 1972*—Filed appendix.

16. *24 March 1972*—Filed brief, appellant with proof of service.

17. *24 April 1972*—Filed brief, appellee with proof of service.

18. *24 May 1972*—Filed stipulation and order (endorsed) application for adjournment of argument is denied; argument of appeal will be heard at Bridgeport during week of 6-26-72.

Docket Entries.

19. *28 June 1972*—Argument heard (by: Moore, Smith, Timbers CJJ).

20. *7 September 1972*—Judgment affirmed, Smith, CJ.

21. *7 September 1972*—Dissenting in separate opinion, Timbers, CJ.

22. *7 September 1972*—Filed judgment.

23. *20 September 1972*—Filed petition for rehearing and rehearing in banc with proof of service.

24. *20 September 1972*—Filed itemized and verified bill of costs with proof of service.

25. *18 October 1972*—Filed order denying petition for rehearing.

26. *18 October 1972*—Filed order denying petition for rehearing in banc, Kaufman, CJ.

27. *18 October 1972*—Concurring in separate opinion, Mansfield and Mulligan, CJJ.

28. *18 October 1972*—Concurring with Judge Mansfield in separate opinion, Kaufman & Mulligan.

29. *18 October 1972*—Dissenting in separate opinion, Timbers, CJ.

30. *30 November 1972*—Filed motion to stay the issuance of the mandate pursuant to 41 (b) with proof of service.

31. *18 December 1972*—Filed order granting motion to stay the issuance of the mandate pursuant to 41 (b).

32. *21 December 1972*—Filed notice of filing of petition for writ of certiorari (S. C. 72-888).

33. *26 February 1973*—Filed certified copy of order of Supreme Court granting petition for writ of certiorari.

Complaint

UNITED STATES DISTRICT COURT

District of Vermont

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

v.

INTERNATIONAL PAPER COMPANY.

Docket No. 6192

NOW COME H. Keith Zahn and Valerie Zahn, and Charles Leazer and Marion L. Leazer, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs, and complain as follows:

COUNT I.

1. Plaintiffs are citizens of the State of Vermont, and the Defendant is a corporation organized under the laws of the State of New York and has its principal place of business in the State of New York. The matter in controversy, exclusive

of interest and costs, as to each of the named Plaintiffs, exceeds the sum of $10,000.00. Jurisdiction is founded on 28 U. S. C. A. 1332 (a).

2. Plaintiffs bring this action on behalf of themselves and, under Federal Civil Procedure Rule 23, on behalf of all other Lake Champlain lakeshore landowners and lakeshore lessees similarly situated and located in the Towns of Orwell, Shoreham and Bridport, County of Addison, State of Vermont; the said lakeshore landowners and lakeshore lessees in the Towns of Orwell, Shoreham and Bridport number approximately two hundred (200), and it is therefore impracticable to bring them all before Court.

3. There are questions of law and fact common to the entire class of lakeshore landowners and lakeshore lessees similarly situated and located in Orwell, Shoreham and Bridport; the claims of the Plaintiffs herein are typical of the claims of the said class; and the Plaintiffs will fairly and adequately protect the interests of and represent said class; the common questions of law and fact predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

4. The Plaintiffs, H. Keith Zahn and Valerie Zahn, are the owners of certain lands and premises having lake frontage on the easterly edge of Lake Champlain in the Town of Orwell, Vermont, namely, all and the same lands and premises conveyed to the Plaintiffs Zahn by Warranty Deed of Harry W. Holden and Elinor S. Holden, dated 19 July 1963, and recorded in Book 29, Page 126, of the Orwell Land Records, said lands including over one-half mile of lakeshore frontage.

5. The Plaintiffs, Charles Leazer and Marion L. Leazer, are the owners of certain lands and premises having lake frontage on the easterly edge of Lake Champlain in the Town of Orwell, Vermont, being all and the same lands and premises conveyed to the Plaintiffs Leazer by Deed of Manfred Ehrich, dated 16 October 1967 and recorded in Book 31, Page 220 of the Orwell Land Records, said lands and premises including over 1,800 feet of lakeshore frontage.

6. At all material times, the Defendant, International Paper Company, operates and has operated a pulp and paper making plant in the Village of Ticonderoga, New York, adjacent to Ticonderoga Creek, which flows from Lake George, in the State of New York, to Lake Champlain.

7. At all material times, the Defendant, International Paper Company, has discharged pulp and paper making waste, and untreated and inadequately treated domestic or sanitary sewage into Ticonderoga Creek approximately two miles from its entry into Lake Champlain.

8. At all material times, the Defendant's pulp and paper making waste has been discharged on a daily basis in volumes of approximately fifteen million gallons per day, and said waste consists of organically active, oxygen consuming material, both in suspension and solution, and other waste materials.

9. At all material times, the Defendant's untreated and inadequately treated domestic or sanitary waste has been discharged on a daily basis, and said discharge consists of the waste from approximately 1,100 employees, in the amount of approximately 33,000 gallons per day.

10. The above mentioned pulp and paper making waste and domestic or sanitary waste at all material times has ex-

ceeded and exceeds the capacity of Ticonderoga Creek and of Lake Champlain to assimilate them, and as a proximate result, these wastes are transported naturally by the Creek and by Lake Champlain in, on and through the waters of Lake Champlain, affecting the Plaintiffs' properties and the properties of the other members of the class as hereafter set forth.

11. As a proximate result of the above mentioned discharges of the Defendant, the Defendant has caused a massive sludge blanket or bed, consisting of approximately 1,430,000 cubic yards, to form in Ticonderoga Creek and in the bottom of Lake Champlain, said sludge bed or blanket on the bottom of Lake Champlain consisting of approximately 300 acres, or 802,000 cubic yards, to depths of up to 12 feet; and said sludge blanket or bed consists of woodchips, cinders, and other organic waste material in a state of decay. As a proximate result of the formation and existence of the above mentioned sludge bed or blanket, the Plaintiffs' properties and the properties of the other members of the class have been affected as hereafter set forth.

12. As a proximate result of the Defendant's actions in forming the aforementioned sludge blanket, large masses of sludge have broken from the sludge bed and have been carried across Lake Champlain and deposited on the Plaintiffs' shorefront properties, and on the properties of the other members of the class.

13. Said blankets or masses of sludge deposited on the Plaintiffs' lands and the lands of other members of the class are foul, unhealthy, smelly, and aesthetically unpleasing.

14. As a proximate result of the Defendant's actions in forming the above mentioned sludge bed, large blankets or masses of sludge have broken from the sludge bed and have

been carried across Lake Champlain, and have at all material times, floated and become situated on the waters adjacent to the Plaintiffs' properties and the properties of the other members of the class. Said floating masses of sludge have been and are unhealthy, smelly, and aesthetically unpleasing and have caused the waters in, around, and adjacent to the Plaintiffs' properties and the properties of the other members of the class to become foul, unhealthy, smelly, and aesthetically unpleasing.

15. As a proximate result of the discharges of the Defendant, the waters of Lake Champlain in, around, and adjacent to the Plaintiffs' lakefront properties, and the lakefront properties of the other members of the class, have been and are severely polluted, foul, smelly, unhealthy, and aesthetically unpleasing.

16. As a proximate result of the discharges of the Defendant, the waters of Lake Champlain in, around, and adjacent to the Plaintiffs' properties, and the properties of the other members of the class, have been made unfit for and are unfit for any reasonable recreational uses, including fishing, swimming, boating, water skiing, and general bathing.

17. As a proximate result of the above discharges of the Defendant, the waters of Lake Champlain in, around, about and adjacent to the Plaintiffs' properties and the properties of the other members of the class have been made unfit for drinking, recreation, or any other reasonable use.

18. As a proximate result of the discharges of the Defendant, the waters of Lake Champlain in, about, around and adjacent to the Plaintiffs' properties and the properties of the other members of the class have been degraded below the water quality standards set forth by the Vermont Department of Water Resources and below the water quality stand-

ards set forth under the statutes and regulations of the United States.

19. The aforesaid actions of the Defendant are willful, intentional, unreasonable, and in disregard of the rights of the Plaintiffs and other members of the class.

20. As a proximate result of the discharges of the Defendant, and the pollution of the waters of Lake Champlain as aforesaid, the Plaintiffs and the other members of the class have been unable to utilize their lakeshore properties, and the waters of Lake Champlain in and around and adjacent thereto, for drinking water, fishing, bathing, boating, swimming, and other recreational uses and other reasonable uses. The Plaintiffs and other members of the class have experienced a loss of enjoyment of their lakeshore properties as a result of their inability to use them for recreational uses or other reasonable uses. The Plaintiffs and other members of the class have further suffered a dimunition in the rental value of their lakeshore lands as a proximate result of the pollution and other acts of the Defendant above referred to.

21. As a proximate result of the depositing of floating portions of the sludge bed on their properties as aforesaid, the Plaintiffs and other members of the class have been unable to utilize their lakeshore properties, and the waters of Lake Champlain in and around and adjacent thereto, for drinking water, fishing, bathing, boating, swimming, and other recreational uses, and other reasonable uses. The Plaintiffs and other members of the class have experienced a loss of enjoyment of their Lakeshore properties as a result of their inability to use them for recreational uses or other reasonable uses. The Plaintiffs and other members of the class have further suffered a diminution in the rental value of their lakeshore lands as a proximate result of the pollution and other acts of the Defendant above referred to.

WHEREFORE, the Plaintiffs, individually, and on behalf of the other members of the class, demand judgment against the Defendant in the amount of Ten Million and 00/100 Dollars—($10,000,000.00), for the recovery of which, together with interest and just costs, they bring this suit; and the Plaintiffs further pray that this matter be tried by jury.

COUNT II.

1. The Plaintiffs allege and incorporate herein as though specifically set forth Paragraphs 1 through 19 of COUNT I of the Complaint.

2. As a proximate result of the discharges of the Defendant, the aforementioned sludge bed at the mouth of Ticonderoga Creek and in Lake Champlain will continue to be organically active, will continue to degrade the water quality of the waters of Lake Champlain and pollute the waters of Lake Champlain in, around, and adjacent to the lakeshore properties of the Plaintiffs and other members of the class.

3. As a proximate result of the discharges of the Defendant, portions of the above mentioned sludge bed lying at the mouth of Ticonderoga Creek and in the waters of Lake Champlain will continue to break off and be carried across Lake Champlain to be deposited on the Plaintiffs' properties and the properties of other members of the class.

4. As a proximate result of the discharges of the Defendant, portions of the aforementioned sludge bed will continue to break off in the future and will continue to be carried across Lake Champlain and will continue to float in the waters in, around, and adjacent to the Plaintiffs' lakeshore properties and the lakeshore properties of the other members of the class.

5. As a proximate result of the discharges of the Defendant, the Plaintiffs and other members of the class have been deprived of and will continue to lose the recreational uses of their lakeshore properties, including fishing, swimming, bathing and boating, and they have lost and will continue to be deprived of other reasonable uses of said waters.

6. As a proximate result of the discharges of the Defendant, the fair market value of the Plaintiffs' lakeshore frontage properties and the lakeshore frontage properties of the other members of the class has been diminished and reduced below the value of comparable properties on Lake Champlain and below the values which such lakeshore frontage properties would have were the waters of Lake Champlain adjacent thereto not polluted, foul, unappealing, unhealthy, and aesthetically unpleasing.

WHEREFORE, the Plaintiffs, on behalf of themselves and other members of the class, demand judgment against the Defendant in the amount of Ten Million and 00/100 Dollars—($10,000,000.00); and the Plaintiffs further pray that this matter be tried by jury.

COUNT III.

1. Plaintiffs allege and incorporate herein as though specifically set forth Paragraphs 1 through 19 of COUNT I of the Complaint.

2. The Plaintiffs and other members of the class are riparian owners along the easterly shores of Lake Champlain.

3. That the uses of the waters of Lake Champlain by the Defendant as aforesaid are unreasonable and in violation of

the rights of the Plaintiffs and the other members of the class to the use of said waters as riparian owners.

4. The Defendant as a proximate result of the above actions has damaged and permanently reduced the value of the riparian rights of the Plaintiffs and the other members of the class in that the Defendant has impaired the recreational value of the waters of Lake Champlain in, around and adjacent to the lakeshore properties of the Plaintiffs and the other members of the class, and in that the Defendant has so polluted the said waters that they are unfit for any reasonable use.

WHEREFORE, the Plaintiffs, on behalf of themselves and other members of the class, demand judgment against the Defendant in the amount of Ten Million and 00/100 Dollars—($10,000,000.00); and the Plaintiffs further pray that this matter be tried by jury.

COUNT IV.

1. Plaintiffs allege and incorporate herein as though specifically set forth Paragraphs 1 through 19 of COUNT I of the Complaint.

2. The Defendant had and has the means at its reasonable disposal of dealing with the waste and pollutants of its plant so as not to affect the interests of the Plaintiffs and the other members of the class, but it failed and continues to fail to do so.

3. The actions of the Defendant as set forth above were undertaken and actuated by evil motives in that they were malicious, wanton, with wicked intention, and the damages to the Plaintiffs and all members of the class were thus maliciously and willfully inflicted.

4. The Plaintiffs and all members of the class because of the malicious, wanton, and wickedly intended acts of the Defendant, are entitled to punitive and exemplary damages.

WHEREFORE, the Plaintiffs in the instant action, on behalf of themselves and all members of the class, pray that they be awarded punitive and exemplary damages in the amount of Ten Million and 00/100 Dollars—($10,000,000.00) and further pray that such sums as are awarded by the Court for said exemplary and punitive damages be set aside for the benefit of encouraging a pollution free environment in the area of Lake Champlain and its tributaries under such terms and conditions as are set forth by this Court; and the Plaintiffs further pray that this matter be tried by jury.

Dated at Middlebury, Vermont, this 9 day of February, 1971.

LANDROCK & SPERRY,
Attorneys for Plaintiffs.
By: /s/ Peter F. Langrock,
A Member of the Firm.

Answer.

(Title omitted in printing.)

Defendant International Paper Company, by its attorneys Black & Plante, for its answer to the complaint herein:

COUNT I.

1. Denies Paragraph 1 except is without knowledge or information sufficient to form a belief as to the truth of the

averments of the first sentence of paragraph 1 and admits that defendant is a corporation organized under the laws of the State of New York with its principal place of business in the State of New York and that plaintiffs purport to bring this action pursuant to 28 U. S. C. 1332 (a).

2. Denies paragraph 2.

3. Denies paragraph 3.

4. Is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 4.

5. Is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 5.

6. Denies paragraph 6 except admits that until December 1, 1970 defendant operated a pulp mill and paper plant in the Village of Ticonderoga, New York, on which date the pulp mill and certain other units were permanently shut down and defendant intends that all remaining operations at the plant will be permanently shut down in mid-April, 1971, barring unforeseen circumstances, and in any event not later than July 1, 1971.

7. Denies paragraph 7.

8. Denies paragraph 8.

9. Denies paragraph 9.

10. Denies paragraph 10.

11. Denies paragraph 11.

12. Denies paragraph 12.

13. Denies paragraph 13.

14. Denies paragraph 14.

15. Denies paragraph 15.

16. Denies paragraph 16.

17. Denies paragraph 17.

18. Denies paragraph 18.

19. Denies paragraph 19.

20. Denies paragraph 20.

21. Denies paragraph 21.

AFFIRMATIVE DEFENSES.

22. Count I fails to state a claim upon which relief can be granted.

23. The cause of action alleged is barred, in whole or in part, by the applicable Statute of Limitations.

24. Plaintiffs have failed to join as parties defendant persons needed for the just adjudication of this action as required by Rule 19 of the Federal Rules of Civil Procedure.

25. The action is not maintainable as a class action under Rule 23 of the Federal Rules of Civil Procedure.

COUNT II.

1. Defendant repeats and realleges each and every averment set forth in response to paragraphs 1 through 19 of Count I of the complaint herein.

2. Denies paragraph 2.

3. Denies paragraph 3.

4. Denies paragraph 4.

5. Denies paragraph 5.

6. Denies paragraph 6.

AFFIRMATIVE DEFENSES.

7. Count II fails to state a claim upon which relief can be granted.

8. The cause of action alleged is barred, in whole or in part, by the applicable Statute of Limitations.

9. Plaintiffs have failed to join as parties defendant persons needed for the just adjudication of this action as required by Rule 19 of the Federal Rules of Civil Procedure.

10. The action is not maintainable as a class action under Rule 23 of the Federal Rules of Civil Procedure.

COUNT III.

1. Defendant repeats and realleges each and every averment set forth in response to paragraphs 1 through 19 of Count I of the complaint herein.

2. Is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 2.

3. Denies paragraph 3.

4. Denies paragraph 4.

AFFIRMATIVE DEFENSES.

5. Count III fails to state a claim upon which relief can be granted.

Answer.

6. The cause of action alleged is barred, in whole or in part, by the applicable Statute of Limitations.

7. Plaintiffs have failed to join as parties defendant persons needed for the just adjudication of this action as required by Rule 19 of the Federal Rules of Civil Procedure.

8. The action is not maintainable as a class action under Rule 23 of the Federal Rules of Civil Procedure.

COUNT IV.

1. Defendant repeats and realleges each and every averment set forth in response to paragraphs 1 through 19 of Count I of the complaint herein.

2. Denies paragraph 2.

3. Denies paragraph 3.

4. Denies paragraph 4.

AFFIRMATIVE DEFENSES.

5. Count IV fails to state a claim upon which relief can be granted.

6. The cause of action alleged is barred, in whole or in part, by the applicable Statute of Limitations.

7. Plaintiffs have failed to join as parties defendant persons needed for the just adjudication of this action as required by Rule 19 of the Federal Rules of Civil Procedure.

8. The action is not maintainable as a class action under Rule 23 of the Federal Rules of Civil Procedure.

Decision of United States District Court for District of Vermont.

WHEREFORE, defendant International Paper Company demands judgment dismissing the complaint herein, together with the costs and disbursements of this action.

Dated at White River Junction, Vermont

March 2, 1971

BLACK & PLANTE,
By: /s/ Henry F. Black,
A Member of the Firm.

DAVIS POLK & WARDWELL,
By: /s/ Taggart Whipple,
A Member of the Firm.

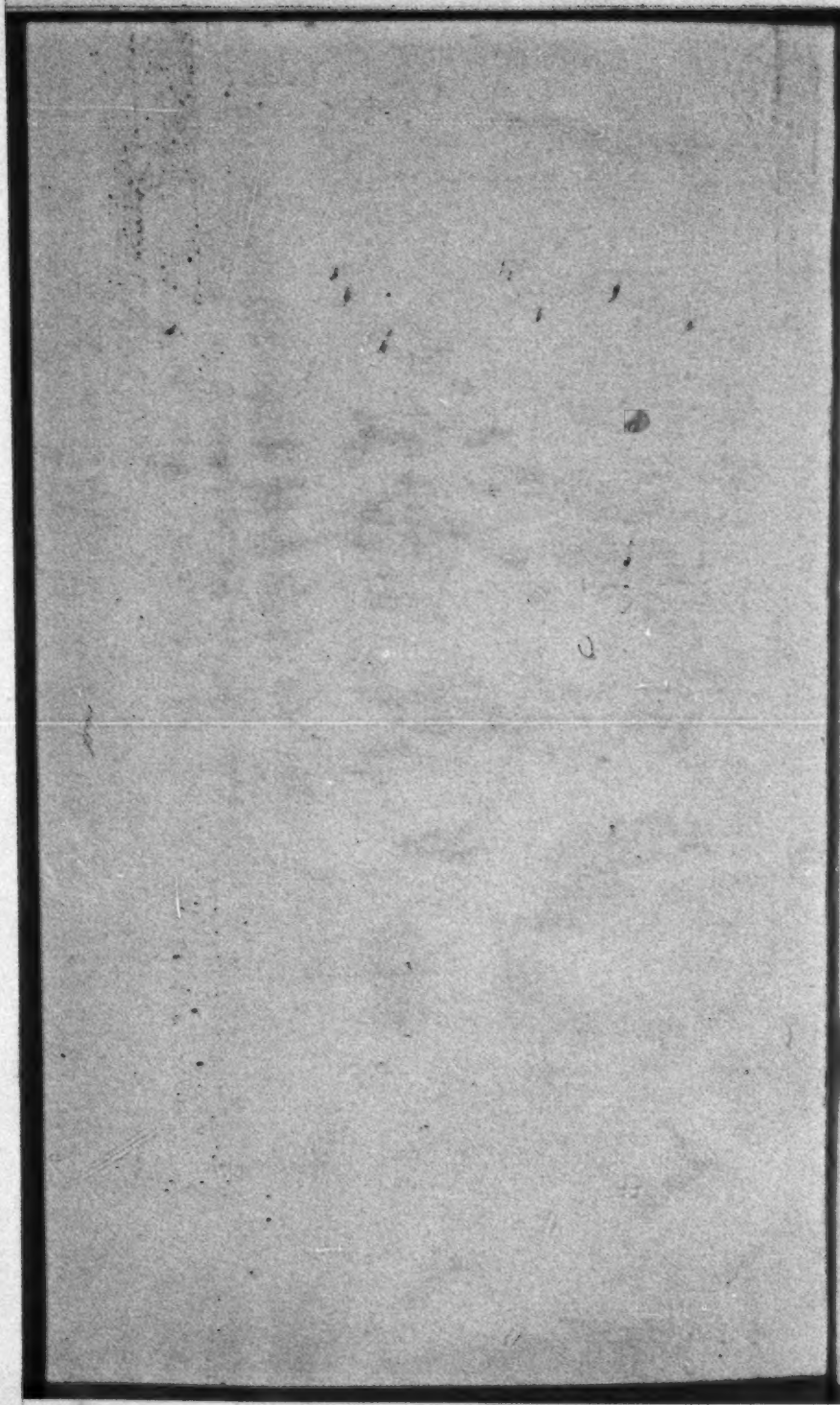
(Certificate of Service omitted in printing.)

Decision of the United States District Court for the District of Vermont can be found in Appendix C at page 40 of the Petition for Writ of Certiorari.

Decision of United States Court of Appeals for the Second Circuit.

Decision of the United States Court of Appeals for the Second Circuit can be found in Appendix A at page 15 of the Petition for Writ of Certiorari.

Decision of the United States Court of Appeals for the Second Circuit denying Petition for Rehearing can be found in Appendix B at page 32 of the Petition for Writ of Certiorari.



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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LANGROCK AND SPERRY,
PETER F. LANGROCK, ESQ.,
Drawer 351,
Middlebury, Vermont 05753,
Counsel for Petitioners.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1972

No. .....

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on September 7, 1972. Motion for Rehearing denied October 18, 1972.

Reference to Opinions of Courts Below

The Opinion of the United States Court of Appeals for the Second Circuit, Docket No. 71-2157, dated September 7, 1972, is not officially reported. It is attached hereto as Appendix A.

The Opinion of the United States Court of Appeals for the Second Circuit, Docket No. 71-2157, dated October 18, 1972, is not officially reported and is attached hereto as Appendix B.

The Opinion and Order of the United States District Court for the District of Vermont, Docket No. 71-2157, dated September 30, 1971, and that Court's Amendment to its Order dated October 21, 1971, are attached hereto as Appendix C.

The Opinion of the United States District Court for the District of Vermont is reported at 53 F. R. D. 430.

Grounds for Jurisdiction

Petitioners seek review of the Judgment of the United States Court of Appeals for the Second Circuit dated September 7, 1972, Docket No. 742; that Court, by a 2 to 1 vote affirmed the Order of the United States District Court for the District of Vermont, dated September 30, 1971, both Courts holding that the United States District Court for the District of Vermont did not have jurisdiction over the Plaintiff class.

On October 18, 1972, the United States Court of Appeals for the Second Circuit, with a 4 to 3 vote *in favor*, denied Plaintiff Petitioners' Petition for a Rehearing containing a suggestion that the appeal be reheard en banc.

The statutory provision believed to confer on this Court jurisdiction to review the Judgment of the United States Court of Appeals for the Second Circuit by Writ of Certiorari is 28 U. S. C. 1254 (1).

Question Presented for Review

The question presented for review in this matter is whether a diversity action brought under 28 U. S. C. A. 1332 (a) will be allowed to proceed as a class action under Fed. R. Civ. P. 23 (b) (3) when the named Plaintiffs meet the jurisdictional amount requirement of 28 U. S. C. A. 1332 (a) but other unnamed Plaintiffs of the class do not.

Statutes and Rules Involved

The statutes and rules involved in this matter are as follows:

28 U. S. C. A. 1332 Diversity of citizenship; amount in controversy; costs

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or citizens or subjects thereof; and

(3) citizens of different States and in which . . ."

Fed. R. Civ. P. 23 (a) and (b) (3):

"Rule 23.

CLASS ACTIONS

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so

numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Statement as to Whether any Federal Court has Certified to the United States Attorney General Pursuant to 28 U. S. C. A. 2403 as Required by Supreme Court Rule 33

This action does not involve a proceeding in a court of the United States wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question and therefore none of the courts in this matter have certified to the Attorney General pursuant to 28 U. S. C. A. 2403 the fact that the constitutionality of any Act of Congress has been drawn in questions.

Statement of the Case

This Writ is sought to review the September 7, 1972 affirmation by the United States Court of Appeals for the Second Circuit of a Decision of the United States District Court of the District of Vermont, dated September 30, 1971, wherein the District Court denied permission for this case to proceed as a class action under Fed. R. Civ. P. 23 (b) (3).

This is a diversity action seeking compensation and punitive damages for harm to the Plaintiff's lakefront properties caused by the Defendant International Paper Company's alleged pollution of Lake Champlain. The action was filed in the United States District Court for the District of Vermont on February 9, 1971 by the named Plaintiffs on behalf of themselves individually and on behalf of all other Plaintiffs similarly situated. The basis for jurisdiction in the first instance was 28 U. S. C. A. 1332 (a). The District Court dismissed this case for lack of jurisdiction as to all members of the class except the named Plaintiffs, and then permitted an interlocutory appeal under 28 U. S. C. A. 1292 (b).

The Complaint alleged that discharges into Ticonderoga Bay in southern Lake Champlain from Defendant's pulp and paper manufacturing plant in Ticonderoga, New York, had caused the formation of a "sludge blanket or bed" of woodchips, cinders, and other decaying organic waste material, had adversely affected the water quality of the lake, and had resulted in deposits of portions of the sludge on Vermont lakefront properties across from the plant. The named Plaintiffs sued on behalf of a class of some 200 lakefront landowners and lessees in a three-town geographic area, claiming that the value of their properties has been diminished as a result of discharges from the plant, and

seeking compensatory and punitive damages. The Complaint alleges that the named Plaintiffs have each suffered damages in excess of $10,000.00, but makes no allegations as to the damages of the unnamed members of the purported class.

This is essentially the same set of facts which produced a suit of which this Court took original jurisdiction during the October Term, 1970, *State of Vermont* v. *State of New York and International Paper Company*. That case is presently being tried before a master.

The District Court held "with great reluctance" (37) that this suit could not be maintained as a class action under Fed. R. Civ. P. 23(b) (3), reading *Snyder* v. *Harris*, 394 U. S. 332 (1969), to require that:

> "each class member in a spurious class action must independently satisfy the requirement as to jurisdictional amount." (44)

Judge Leddy found that in this case:

> "it is unlikely that the property of every lakefront landowner in the towns of Orwell, Shoreham, and Bridport is valued at $10,000.00, and, to a legal certainty, it is not credible that every such owner has suffered pollution damage in excess of $10,000." (42)

He observed that:

> "the requirement that each class member meet the jurisdictional amount clearly undermines the usefulness of Rule 23 (b) (3) class suits, because the problem of defining an appropriate class over which the court has jurisdiction will often prove insuperable." (46)

Nevertheless, Judge Leddy felt compelled to order that the action not be permitted to proceed as a class action.

The United States Court of Appeals for the Second Circuit, by a 2 to 1 vote, affirmed on September 7, 1972. In dissent, Judge Timbers argued that ancillary jurisdiction should operate to allow class treatment of this suit. He wrote:

> "The majority's reliance on *Snyder* v. *Harris* . . . strikes me as being unsupportable. In *Snyder* no member of the class had a claim that could satisfy the amount in controversy requirement; so that the Court never reached the ancillary jurisdiction issue." (27)

Unlike *Snyder*, Judge Timbers argued, this case is properly within federal jurisdiction with regard to the named Plaintiffs, and ancillary jurisdiction should extend to the unnamed Plaintiffs.

The majority opinion did not directly treat the question whether ancillary jurisdiction exists as to the unnamed Plaintiffs in this case. Accordingly, on September 18, 1972, Plaintiffs filed a petition for a rehearing containing a suggestion that the appeal be reheard en banc. Of the eight active Second Circuit judges, one disqualified himself. Of the seven remaining judges, four voted in favor of en banc reconsideration, and three opposed reconsideration. The petition was nevertheless denied, because Fed. R. App. P. 35(a) authorizes a rehearing en banc only when ordered by a "majority of the circuit judges who are in regular active service", apparently requiring a 5-2 vote in order for this appeal to be reconsidered. Judge Timbers, joined by Judge Oakes, dissented from this application of the rule.

Reasons Relied on for the Allowance of the Writ

The Supreme Court should grant this writ because the United States Court of Appeals for the Second Circuit has decided an important question of federal law which has not been, but should be, decided by this Court.

In deciding that the unnamed plaintiffs in a Rule 23 (b) (3) class action must meet the jurisdictional amount requirement, the Court of Appeals has rendered the class action device unavailable to the small claimant. While this result might be applauded if the effect were to prevent small, individual claims from clogging the federal courts, the effect here is to prevent the adjudication of suits in which the damages, though large and though resulting from a single cause, are widely dispersed. This result is contrary to the intent of the rule makers. As Judge Timbers observed in his dissent: "The purpose of the Rule 23 (b) (3) class action was to provide an efficient and economically effective procedure for adjudicating small, closely related claims." (25) The importance of the question decided by the Court of Appeals for the Second Circuit is apparent. That Court's decision completely undermines the usefulness of Rule 23 (b) (3) class suits in any action, federal question or diversity, where there is a jurisdictional amount requirement.

This Court has not decided that unnamed Rule 23 (b) (3) claimants must meet the jurisdictional amount requirement where the named members of the suit do meet the requirement. In *Snyder* v. *Harris*, 394 U. S. 332 (1969) none of the named claimants, and no member of the alleged class satisfied the jurisdictional amount requirement. The Court in that case held that the jurisdictional amount could not be reached by merely aggregating claims, but the Court in that case did not reach the

issue presented here. In fact, the Court in that case, specifically declined to rule on the issue presented here when it said:

> "It is urged, however, that this Court should now overrule its established statutory interpretation and hold that 'matter in controversy' encompasses the aggregation of all claims that can be brought together in a single suit, *regardless of whether any single plaintiff has a claim that exceeds the required amount.* (emphasis added)"
>
> *Snyder* v. *Harris*, 394 U. S. 338.

Nevertheless, language exists in *Snyder* which persuaded the courts below that the law requires that all plaintiffs satisfy the requirement. The language was insufficient, however, to convince a majority of the active judges in the Second Circuit that such is the case. Judge Timbers vigorously dissented from the majority opinion's reading of *Snyder*. Four judges voted to rehear the appeal en banc on the issue whether ancillary jurisdiction exists as to the unnamed plaintiffs here. The law is far from settled on this important question.

The Supreme Court should grant this writ in order to prevent wasteful relitigation of this issue. The importance of the Rule 23 (b) (3) class action will encourage actions by litigants whose interest is the ultimate production of a workable class action device on the Rule 23 (b) (3) model. If this writ is denied, such litigants will relitigate the issue presented here in the hope that *they* will be granted certiorari. Those members of the legal profession interested in the class action device cannot know where to direct their efforts at reform until this Court has decided whether ancillary jurisdiction extends to such unnamed plaintiffs as this case presents.

The present posture of the decision in this case, if left to stand as it is, will encourage relitigation as well. The majority appellate decision did not treat the ancillary jurisdiction question, thus leaving intact the jurisdictional theory that relitigants must naturally rely on. Judge Timbers' dissent and the fact that four Second Circuit judges voted to rehear the appeal en banc will encourage potential litigants in the belief that, given the proper panel, they will be able to gain class status under similar circumstances despite the Second Circuit majority decision. Such wasteful relitigation can be avoided by the Court's granting this writ.

The courts below are already split on the underlying question, generally presented in a joinder context, whether ancillary jurisdiction exists as to plaintiffs not meeting the jurisdictional amount requirement where one or more plaintiffs do satisfy the requirement. For cases indicating that the Court has discretion to hear the insufficient claim, see *Hatridge* v. *Aetna Cas. & Surety Co.*, C. A. 8th, 1969, 415 F. 2d 809; *Stone* v. *Stone*, C. A. 4th, 1968, 405 F. 2d 94, 96-99; *Jacobson* v. *Atlantic City Hospital*, C. A. 3d, 1968, 392 F. 2d 149, noted 1968, 30 U. Pitts. L. Rev. 413; *Wilson* v. *American Chain & Cable Co.*, C. A. 3d, 1966, 364 F. 2d 558, noted 1967, 16 Cath. U. L. Rev. 336, 66 Mich. L. Rev. 373; *General Research, Inc.* v. *American Employers' Ins. Co.*, D. C. Mich. 1968, 289 F. Supp. 735; *Lucas* v. *Seagrave Corp.*, D. C. Minn. 1967, 277 F. Supp. 338; *Wiggs* v. *City of Tullahoma*, D. C. Tenn. 1966, 261 F. Supp. 821; *Johns-Manville Sales Corp.* v. *Chicago Title & Trust Co.*, D. C. Ill. 1966, 261 F. Supp. 905, noted 1967, 81 Harv. L. Rev. 480; and cases cited 1 Barron & Holtzoff (Wright ed.) Section 24 n. 56.3. For cases indicating the contrary, see *Clark* v. *Paul Gray, Inc.*, 1939, 59 S. Ct. 744, 306 U. S. 583, 83 L. Ed. 1001; *Hymer* v. *Chai*, C. A. 9th, 1969, 407

F. 2d 136, *Aetna Ins. Co.* v. *Chicago, R. I. & P. R. Co.*, C. A. 10th, 1956, 229 F. 2d 584, noted 1957, 10 Okl. L. Rev. 92; *Jewell v. Grain Dealers Mut. Ins. Co.*, C. A. 5th, 1961, 290 F. 2d 11, criticised 1961, 64 W. Va. L. Rev. 87; *Hackner* v. *Guaranty Trust Co. of New york.*, C. C. A. 2d 1941, 117 F. 2d 95, certiorari denied 61 S. Ct. 835, 313 U. S. 559, 85 L. Ed. 1520; *Rompe* v. *Yablon*, D. C. N. Y. 1967, 277 F. Supp. 662; *Diepen* v. *Fernow*, D. C. Mich. 1940, 1 F. R. D. 378; and cases cited 1 Barron & Holtzoff (Wright ed.) section 24 n. 56.3. By granting this writ, the Court would be taking a step forward bringing order to this important area of procedure.

It is unrealistic to expect Congress to consider the issues presented here until this Court has considered them. An underlying issue here is whether there is a conflict between the statutory jurisdictional amount requirement and the intent of the makers of Rule 23 (b) (3). While theoretically Congress could act at any time to authorize ancillary jurisdiction in Rule 23 (b) (3) situations, Congress is unlikely as a practical matter to consider the desirability of such action until this Court has decided, in effect, whether Congressional action is necessary if Rule 23 (b) (3) is to be available in this situation. If this writ is denied, the possibility will persist that this Court will eventually decide that ancillary jurisdiction will allow the maintenance of a Rule 23 (b) (3) action such as this one, consistently with the jurisdictional amount requirement. Given that possibility, it is unrealistic to expect Congress to consider the question until this Court acts. It would appear, therefore, that the responsibility for resolving the confusion in this area belongs to this Court.

Judge Timbers, in dissenting from the denial of en banc reconsideration of this appeal, observed:

> "The record in this case strikes me as a particularly good one on which to resolve this important issue. The facts are not in dispute. The legal question is starkly presented. The issue to be resolved is both important and sure to recur." (38)

This argument applies equally to the question whether this Court should grant this writ. Because the record here presents the legal question clearly, in absence of factual dispute, this case provides the Court with an excellent opportunity to resolve an issue which is "both important and sure to recur."

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LANGROCK & SPERRY,

By: Peter F. Langrock, Esq.,
A Member of the Firm,
Drawer 351,
Middlebury, Vermont 05753.

Notice of Appearance

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

Now Comes, Peter F. Langrock, Esq. of the law firm of Langrock and Sperry, and appears for the Plaintiffs, H. Keith Zahn, Valerie Zahn, Charles Leazer and Marion L. Leazer, in the above captioned matter.

Dated at Middlebury, County of Addison and State of Vermont, this ..... day of November, 1972.

LANGROCK AND SPERRY,

By: PETER F. LANGROCK, ESQ.,
Drawer 351,
Middlebury, Vermont 05753.

Certificate of Service

I, Peter F. Langrock, Esq., a member of the firm of Langrock and Sperry, Drawer 351, Middlebury, Vermont 05753, attorney for the Plaintiffs in the above entitled cause and the Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1972, I served copies of the foregoing Petition for a Writ of Certiorari and all appendices attached thereto and my Notice of Appearance on the International Paper Company, by mailing three copies thereof, in a duly addressed envelope with first class postage pre-paid, to the attorneys of record for said Defendant, Taggert Whipple, Esq., a member of the firm of Davis, Polk & Wardwell, 1 Chase Manhattan Plaza, New York, New York 10005; and Henry F. Black, Esq., a member of the firm of Black & Plante, Municipal Building, White River Junction, Vermont 05001.

PETER F. LANGROCK, ESQ.,
LANGROCK & SPERRY,
Drawer 351,
Middlebury, Vermont 05753.

APPENDIX A

Decision of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 742—September Term, 1971.

(Argued June 28, 1972 Decided September 7, 1972.)

Docket No. 71-2157

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER, and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Plaintiffs-Appellants,

v.

INTERNATIONAL PAPER COMPANY,

Defendant-Appellee.

Before: Moore, Smith and Timbers,

Circuit Judges.

Interlocutory appeal under 28 U. S. C. § 1292(b) from order of the United States District Court for the District of Vermont, Bernard J. Leddy, Chief Judge, ordering that action not proceed as class action.

Affirmed.

Mark L. Sperry, Middlebury, Vt. (Langrock & Sperry, Middlebury, Vt.), for Plaintiffs-Appellants.

Taggart Whipple, New York, N. Y. (Davis, Polk & Wardwell, New York, N. Y., Richard E. Nolan, William H. Levit, Jr. and Ronald V. Bryant, of counsel)

and

Black & Plante, White River Junction, Vt. (Henry F. Black and George W. Ray, Jr., White River Junction, Vt.), of counsel, for Defendant-Appellee.

SMITH, *Circuit Judge:*

We are confronted with the novel question whether a diversity case will be allowed to proceed as a class action under Fed. R. Civ. P. 23(b)(3) when the named plaintiffs meet the jurisdictional amount requirement of 28 U. S. C. § 1332(a) but the unnamed representatives of the class do not.[1] That question was answered in the negative by

[1] The district court found that the named plaintiffs had each made good faith claims of damage in excess of $10,000, but that it was to a legal certainty incredible that each of the other lakefront landowners had suffered pollution damage in that amount. Appellants would cure this defect by allotting to the unnamed plaintiffs their share of the claimed punitive damages ($10,000,000); therefore, they argue, no final determination of class status can be made until after damages have been awarded. But the trial court is plainly not compelled to accept a claim of punitive damages, however unwarranted, made for the purpose of conferring federal jurisdiction. *See Schroeder v. Nationwide Mutual Insurance Co.*, 242 F. Supp. 787, 789 (S. D. N. Y. 1965). Indeed, in computing jurisdictional amount, a claim for punitive damages is to be given closer scrutiny, and the trial judge accorded greater discretion, than a claim for actual damages. *See Brown v. Bank of America Trust & Savings Ass'n.*, 281 F. Supp. 82, 84 (N.D. Ill. 1968). Since punitive damages are considered together with actual damages in determining the amount in controversy, the

(Footnote continued on following page)

the late Chief Judge Leddy in the United States District Court for the District of Vermont (53 F. R. D. 429). He refused to allow the case to proceed as a class action and struck all references in the complaint to persons other than the four named plaintiffs. On October 21, 1971, Judge Leddy certified the order for interlocutory appeal under 28 U. S. C. § 1292(b), and this court granted permission to appeal.

The complaint, brought by the four named owners of lakefront property on Lake Champlain on behalf of themselves and some 200 other similarly situated riparian landowners and lessees, sought compensatory and punitive damages in the total of $40,000,000 for damage to their property rights caused by appellee's alleged pollution of the lake's waters. Purportedly the discharge of untreated or inadequately treated waste from appellee's now-closed pulp and paper making plant in the Village of Ticonderoga, passing into the lake via Ticonderoga Creek, created a massive sludge blanket on the bottom of the lake; masses of sludge apparently break off periodically to wash up on appellants' property. As a consequence appellants' property is claimed to be unfit for any recreational or other reasonable use and to be permanently diminished in value.

(Footnote continued from preceding page)
district court necessarily rejected appellants' claim for punitive damages as exorbitant when it found to a legal certainty that the jurisdictional amount could not be met. Given a mass tort situation in which the conduct complained of has been altered to conform to changing societal attitudes, and in which multiple punitive awards would in any case be of doubtful utility, *see Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 840-841 (2d Cir. 1967), we are not persuaded that the district court has abused its discretion.

With "great reluctance" the district court read *Snyder* v. *Harris*, 394 U. S. 332 (1969) to compel the holding that "each class member in a spurious class action must independently satisfy the requirement as to jurisdictional amount." We agree and affirm the order below.

This case, brought under Rule 23(b)(3), would have been characterized as a "spurious" class action prior to the 1966 amendment of Rule 23. Since the new Rule 23 was intended to substitute a functional, pragmatic approach for the confusing conceptualism of the old rule,[2] the question arose whether the old restrictions which had precluded the aggregation of separate claims to compute the amount in controversy in a spurious class action were discarded. In *Snyder*, the Court stated flatly that the old categories and doctrines still apply to the determination of jurisdictional amount: in class actions which would formerly have been classified as spurious, separate and distinct claims may not be aggregated. It is true that in *Snyder* no single plaintiff met the jurisdictional amount; as the Court stated the issue, it declined to "hold that 'matter in controversy' encompasses the aggregation of all claims that can be brought together in a single suit, regardless of whether *any single plaintiff* has a claim that exceeds the jurisdictional amount." *Snyder*, 394 U. S. at 338 (emphasis supplied). *Snyder* therefore does not squarely hold that every unnamed member of a proposed spurious class must individually satisfy the jurisdictional amount. But appellants' attempt to escape the ambit of *Snyder* by this route is met

[2] *See* C. Wright, Handbook of the Law of Federal Courts § 72, at 307 (2d ed. 1970).

by persuasive internal evidence that the Court did not so limit the rule enunciated there.[3]

The Court stated the jurisdictional rule for the former spurious class action, unaltered by the amended Rule 23, to have been that "*each* plaintiff had to show that his individual claim exceeded the jurisdictional amount." *Id.* at 335 (emphasis supplied). The Court stressed that the aggregation doctrine, grounded in the statutory phrase "matter in controversy," far antedated Rule 23, and adopted by illustration the language of an early joinder case, *Troy Bank* v. *G. A. Whitehead & Co.*:

> When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of *each* be of the requisite jurisdictional amount. . . . 222 U. S. 39, 40. [*Id.* at 336 (emphasis supplied)]

And the analogy to joinder cases remains valid:

> The fact that judgments under class actions formerly classified as spurious may now have the same effect as claims brought under the joinder provisions is certainly no reason to treat them *differently* from joined actions for purposes of aggregation.
> [*Id.* at 337 (emphasis in original)]

After 1938, *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939), the rule evolved in joinder cases that distinct claims could not be aggregated was applied to class actions under the new Federal Rules. Even aside from the clear language quoted above, the Court's reliance on *Clark* appears to

[3] Indeed the dissent plainly read the rule laid down in the majority opinion to deny appellants this escape. *Snyder*, 394 U.S. at 343.

offer an insurmountable obstacle to appellants, for the *Clark* Court had recognized that one originally named member of the proposed class might meet the jurisdictional amount requirement, just as the named plaintiffs do here; yet the action was dismissed as to all plaintiffs except that one. *Clark*, 306 U. S. at 589-5900. It is no basis to distinguish *Clark* that *all*, rather than only one, of the named plaintiffs here meet the jurisdictional amount requirement; the point is that in a spurious class action one plaintiff may not ride in on another's coattails. Similarly the Court of Appeals for the Fifth Circuit, whose position was upheld by *Snyder*, dismissed a purported class action where only one member of the proposed class, albeit not a named member, could make a showing of the requisite jurisdictional amount, citing *Clark* v. *Paul Gray, Inc., supra*. *Alvarez* v. *Pan American Life Insurance Co.*, 375 F.2d 992, 996-997 (5th Cir.), *cert. denied*, 389 U. S. 827 (1967).

We are entirely sympathetic to the proposition that the amended Rule 23 "should be given a liberal rather than a restrictive interpretation" in order to vindicate small federal claims. *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555, 563 (2d Cir. 1968); but the policies underlying the amended rule are not determinative of this case.[4] Rather it is clear in the light of *Snyder*, 394 U. S. at 336, that the critical focus in resolving the issue before us must be on 28 U. S. C. § 1332. Accepting that, one might ask how application of the aggregation doctrine to preclude this class action will

[4] It is clear both from the majority opinion, 394 U.S. at 338, 341 and from the dissent of Justice Fortas, joined by Justice Douglas, *id.* at 342, that the Court in *Snyder* confronted and rejected the same policy arguments based on the amended Rule 23 which are presently made to this court.

sustain the congressional purpose underlying the jurisdictional amount requirement of section 1332 stressed in *Snyder:* to check the rising caseloads in federal courts. After all, this action may still be maintained in federal court under the banner of the named plaintiffs; but that was equally true in *Clark* and *Alvarez*. However, were this case to proceed as a class action it would in fact significantly increase the burden on the federal courts. Once appellee's liability had been established, and even assuming that appellee's defenses would not vary as to different members of appellants' class, it would be an enormously time consuming task to assess the damages suffered by each of the 200 riparian landowners, each of whose claims is regarded as separate and distinct. Indeed the Advisory Committee did not intend that Rule 23(b)(3) ordinarily be utilized in a mass tort situation. Advisory Committee Note, 39 F. R. D. 98, 103 (1966). Moreover a second policy consideration relied on in *Snyder* is relevant here: local controversies involving claims to be settled on the basis of state law "can often be most appropriately tried in state courts." *Snyder*, 394 U. S. at 341.

We are therefore persuaded that the district court properly applied the non-aggregation doctrine in refusing jurisdiction over the plaintiff class proposed in this case.

Affirmed.

Decision of the United States Court of Appeals for the Second Circuit

TIMBERS, *Circuit Judge* (dissenting):

With deference, it seems to me that the majority reads the Supreme Court's decision in *Snyder* v. *Harris*, 394 U. S. 332 (1969), for all it might be worth, rather than for the least it has to be worth. More significantly, the majority decision here ignores the well-established principle that if a case is properly in a federal court, that court has subject matter jurisdiction over the case or controversy in its entirety and therefore can adjudicate related claims of ancillary parties who have no independent jurisdictional grounds.

I.

The concept of "ancillary jurisdiction" has been a part of the jurisprudence of the federal courts for many years. It originally was used to allow parties otherwise without grounds for jurisdiction to assert rights in property that had come under a federal court's control. *Freeman* v. *Howe*, 65 U. S. (24 How.) 450 (1861). Similarly, the doctrine was utilized to enable federal courts to effectuate their judgments in suits that had properly been before them. *Supreme Tribe of Ben-Hur.* v. *Cauble*, 255 U. S. 356 (1921). During this early period, the concept of ancillary jurisdiction was applied only to situations in which its use was necessary to the effective operation of the federal courts.

Since the Supreme Court's decision in *Moore* v. *New York Cotton Exchange*, 270 U. S. 593 (1926), however, the concept has been used primarily to promote judicial economy through the avoidance of piecemeal litigation. In *Moore*, a state claim not independently cognizable in a

federal court was asserted by way of compulsory counterclaim to a federal claim. The Court held that the state claim could be heard in the federal court even though the federal claim was eventually dismissed on the merits. The *Moore* decision was one of the major inspirations for the development of a general principle that federal courts can invoke ancillary jurisdiction to resolve in a single action any disputes, regardless of jurisdictional sufficiency, arising out of the facts supporting the plaintiff's "cause of action". See, e.g. *Hurn* v. *Oursler*, 289 U. S. 238 (1933).

The enactment of the Federal Rules of Civil Procedure, with their provisions for liberal joinder of parties and claims, especially stimulated the growth of the ancillary jurisdiction doctrine. The Rules broadened the concept of a single triable case or controversy by allowing to be joined in one action all parties and claims related to the main action. Also, courts found the ancillary jurisdiction doctrine helpful in putting to use some of the new joinder devices, particularly Rules 14, 20 and 24. Lower federal courts including ours, were quick to recognize that ancillary jurisdiction was available to solve jurisdictional problems, such as lack of diversity or amount in controversy, which were often attendant upon utilization of joinder procedures. See, e.g. *Dery* v. *Wyer*, 265 F. 2d 804 (2 Cir. 1959) (impleader of third party defendant); *Formulabs, Inc.* v. *Hartley Pen Co.*, 318 F. 2d 485 (9 Cir. 1963) (intervention as of right); *Jacobson* v. *Atlantic City Hosp.*, 392 F. 2d 149 (3 Cir. 1968) (simple joinder of parties). But see *Hymes* v. *Chai*, 407 F. 2d 136 (9 Cir. 1969 (simple joinder of

parties).[1] These developments impelled one commentator to say recently that the ancillary jurisdiction doctrine "is in a process of evolution from a rule of prevention of basic unfairness to a rule of convenience for resolving all issues involved in the subject of the matter before the court". Note, Federal Practice: Jurisdiction of Third-Party Claims, 11 Okla. L. Rev. 326, 329 (1958), quoted in 7A Wright & Miller, Federal Practice and Procedure § 1917, at 590 n. 29 (1969. The majority's decision today greatly retards this "process of evolution".

An extension of the ancillary jurisdiction doctrine to permit an adjudication of the claims of the unnamed plaintiffs in this action would be unquestionably harmonious with this development.[2] For example, although in the past the courts had held that they could not invoke ancillary jurisdiction to hear claims for less than $10,000 asserted by parties joined under Rule 20, the majority of recent decisions are to the contrary. See, e.g., *General Research,*

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[1] In addition to a split of authority on the use of ancillary jurisdiction with regard to joinder under Rule 20, the courts have also held that the doctrine may not be used to provide jurisdiction over a party determined to be indispensable under Rule 19, e.g. *Lang* v. *Colonial Pipeline Co.*, 383 F.2d 986 (3 Cir. 1967), or a party seeking permissive intervention under Rule 24(b), e.g. *Hunt Tool Co.* v. *Moore, Inc.*, 212 F.2d 685 (5 Cir. 1954).

[2] Such a result would be consistent with the firmly established rule that claims against third party defendants properly impleaded under Rule 14 need not satisfy the amount in controversy requirement, *King* v. *State Farm Mut. Ins. Co.*, 274 F.Supp. 824 (W.D. Ark. 1967); *Schinella* v. *Iron Workers Union Local 361*, 149 F.Supp. 5 (E.D.N.Y. 1957), and the rule that once federal jurisdiction has been fixed by the original parties of record in a class action, subsequent intervenors need not meet the jurisdictional requirements as to diversity and amount, *Dickinson* v. *Burnham*, 197 F.2d 973 (2 Cir. 1952).

Inc. v. *American Employers' Ins. Co.*, 289 F. Supp. 735 (W. D. Mich. 1968); *Lucas* v. *Seagrave Corp.*, 277 F. Supp. 338 (D. Minn. 1967); *John Manville Sales Corp.* v. *Chicago Title & Trust Co.*, 261 F. Supp. 905 (N. D. Ill. 1966). This change in position reflects growing realization that the disposition of jurisdictionally insufficient claims along with reasonably related claims having an independent jurisdictional basis is expeditious and not unduly burdensome. There is, of course, a limit on the number and nature of claims that can be conveniently tried together, but that limit would not be exceeded by adjudicating all the class members' claims here. Indeed, the purpose of the Rule 23(b)(3) class action device was to provide an efficient and economically effective procedure for adjudicating numerous small, closely related claims. See *Eisen* v. *Carlisle and Jacquelin*, 391 F. 2d 555 (2 Cir. 1968); *Escott* v. *Barchris Construction Corp.*, 340 F. 2d 731 (2 Cir. 1965).

II.

The Supreme Court has not yet dealt with an ancillary jurisdiction doctrine in the context of a decision involving the Federal Rules of Civil Procedure. But in *United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), the Court commented on the impact of the Rules while approving the liberal use of "pendent jurisdiction", a particularized application of the ancillary jurisdiction concept. In *Gibbs*, the plaintiff asserted a claim under § 303 of the Labor Management Relations Act and a state claim of unlawful conspiracy and boycott. The Court held that by means of pendent jurisdiction the federal court had adjudicative power over the state claim. Writing the opinion for the Court, Justice Brennan said:

"... Under the [Federal Civil] Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged. Yet because the *Hurn* question involves issues of jurisdiction as well as convenience, there has been some tendency to limit its application to cases in which the state and federal claims are, as in *Hurn*, 'little more than the equivalent of different epithets to characterize the same group of circumstances.' 289 U.S., at 246.

This limited approach is unnecessarily grudging. Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .' U.S., Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." 383 U.S. at 724-25.

These principles as expressed by the *Gibbs* court apply equally to a situation where the claims of named plaintiffs in a class action are properly before the court but the similar claims of other members of the class lack subject matter jurisdiction: judicial authority over the ancillary claims exist if the relationship between the claims having independent jurisdictional grounds and the pendent claims "permits the conclusion that the entire action before the

court comprises but one constitutional 'case'"; or, as applied to the jurisdictional deficiency in the instant case, "if, considered without regard to" the amount in controversy, the claims satisfying the jurisdictional amount requirement and those that do not "are such that [the parties] would ordinarily be expected to try them all in one judicial proceeding, . . . there is *power* in federal courts to hear the whole". 383 U.S. at 724-25. Indeed, since pendent jurisdiction concerns constitutional limitations on the jurisdiction of federal courts, while the instant suit involves only statutory limitations, the case for recognizing jurisdiction over all class members and their claims here is even stronger. See *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F.2d 800, 809-11 (2 Cir. 1971); cf. *Ryan* v. *J. Walter Thompson Co.*, 453 F.2d 444, 446 (2 Cir. 1971), *cert. denied*, ____ U. S. ____ ( ).

III.

The majority's reliance on *Snyder* v. *Harris*, 394 U.S. 332 (1969), and *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939), strikes me as being unsupportable. In *Snyder* no member of the class had a claim that could satisfy the amount in controversy requirement; so the Court never reached the ancillary jurisdiction issue. The Court held that the separate and distinct claims presented by or on behalf of the various claimants could not be aggregated to supply the $10,000 jurisdictional amount. The Court reached that result because (1) there was a settled line of precedent establishing that separate and distinct claims could not be aggregated for jurisdictional amount purposes, and (2) the workload of the federal courts would

be substantially increased if those precedents were overruled. The Court's position was summarized in the following statement:

> "There is no compelling reason for this Court to overturn a settled interpretation of an important congressional statute in order to add to the burdens of an already overloaded federal court system." 394 U.S. at 341.

The rationale of the *Snyder* decision is inapplicable to the issue before us. There is no "settled line of precedent" that every member of a Rule 23(b)(3) class must satisfy the amount in controversy requirement. The *Snyder* court referred to *Clark* v. *Paul Gray, Inc.*, as the first case to apply the nonaggregation rule to a class action situation. 394 U.S. at 336-37. In that case, as the majority here points out, at least one plaintiff had a claim in excess of $10,000, but the Supreme Court held that each plaintiff who had a similar claim must meet the amount in controversy requirement. That suit, however, seems not to have been a class action, although the *Snyder* court characterized it as such; it was merely a case of permissive joinder. It was decided prior to the 1966 amendment of Rule 23, which had the effect of making a judgment in a Rule 23(b)(3) class action binding on unnamed plaintiffs, thus greatly distinguishing it from a permissive joinder situation and old Rule 23.

Most importantly, whatever the nature of the action in *Clark*, the precedential value of that decision has been substantially reduced by recent decisions. Although the Court in *Snyder* cited *Clark* with approval, its approval

was directed not to the holding in *Clark* but to some of *Clark's* dictum on aggregation of claims. Since *Clark* was decided, moreover, the ancillary jurisdiction doctrine has expanded and grown. As discussed above, within the last few years many federal courts have held that a court has discretion to adjudicate a jurisdictionally insufficient claim joined with a claim for more than $10,000 if the claims derive primarily from the same operative facts. See *Hatridge* v. *Aetna Cas. & Sur. Co.*, 415 F.2d 809 (8 Cir. 1969); *Stone* v. *Stone*, 405 F.2d 94 (4 Cir. 1968); *Jacobson* v. *Atlantic City Hospital*, 392 F.2d 149 (3 Cir. 1968); *Wilson* v. *American Chain and Cable Co.*, 364 F.2d 558 (3 Cir. 1966); Wright, Federal Courts 124, 316 (1970). Cf. *United Mine Workers* v. *Gibbs*, *supra*. But see *Alvarez* v. *Pan American Life Ins. Co.*, 375 F.2d 992, 996-97 (5 Cir.), *cert. denied*, 389 U.S. 827 (1967), referred to by the majority.[3] In the light of this distinct trend, and the Supreme Court's enthusiastic endorsement in *Gibbs* of the ancillary jurisdiction concept, old cases such as *Clark* should be wielded with discrimination.

The other reason for the result in *Snyder*—to avoid a large increase in the workload of the federal courts—is also inapplicable to the present controversy. The four named plaintiffs here meet the jurisdictional requirements; a federal court must adjudicate their claims. The burden on the federal courts would not be substantially increased if the claims of the other class members were to be heard by the same court; the predominate questions of law or

[3] *Alvarez* held that in a class action where the claims of the members are several and distinct, each member must establish jurisdictional amount.

fact with regard to these claims must be common to all the claims or a class action could not be brought. If the trial court decides before or during trial that the resolution of individual issues will be difficult and time-consuming, it can refuse to try the ancillary claims. The *Gibbs* decision provides authority for wide discretion in a trial judge to determine whether all the claims arising out of a transaction or occurrence should be tried together in federal court:

> "That power [pendent jurisdiction] need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction. . . ." 383 U.S. at 726.

The position of the majority in this action promotes duplicative litigation—a trial of the representative claims in the federal court and an identical action by the other class members in the state court. Not only does this discourage the named plaintiffs from asserting their right to a federal forum, but it restricts the use of the Rule 23(b)(3) class action to the extraordinary situation in which every member of the class has a claim in excess of $10,000 (unless a statute dispensing with the jurisdictional amount requirement can be invoked). Furthermore, there is no guarantee that a class action could be initiated in the state court. Many states discourage class actions and if the individual claims are so small that suit would have to be instituted in a state court of limited jurisdiction, most likely the class action device would be unavailable.

Decision of the United States Court of Appeals for the Second Circuit

The majority's decision is not compelled by *Snyder* and *Clark*, as the opinion states. The result reached disregards the development of a second doctrine for more efficient and economical judicial administration and severely impairs the efforts of those who would modernize the federal law of class actions. It undercuts this Circuit's strong policy favoring class actions. I therefore respectfully dissent.

APPENDIX B

Decision of the United States Court of Appeals for the Second Circuit denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 71-2157.

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER,

Plaintiffs-Appellants,

v.

INTERNATIONAL PAPER COMPANY,

Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ LEONARD P. MOORE,
LEONARD P. MOORE,

/s/ J. JOSEPH SMITH,
J. JOSEPH SMITH,

/s/ WILLIAM H. TIMBERS,
(I dissent),
WILLIAM H. TIMBERS,
Circuit Judges.

October 18, 1972.

Decision of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 71-2157

H. KEITH ZAHN and VALERIE ZAHN,
CHARLES LEAZER and MARION L. LEAZER,
Plaintiffs-Appellants,

v.

INTERNATIONAL PAPER COMPANY,
Defendant-Appellee.

A petition for a rehearing containing a suggestion that the appeal be reheard en banc having been filed herein by counsel for the appellants, and a poll of the judges in active service having been taken on the request of such a judge, and Judges Hays, Feinberg, Oakes and Timbers having voted to grant the petition, and Judges Kaufman, Mansfield and Mulligan having voted to deny the petition, and opinions having been filed by Judges Kaufman, Mansfield, and Timbers and Chief Judge Friendly being disqualified,

It is therefore

Ordered that rehearing before the court en banc is denied for want of an affirmative vote "by a majority of the circuit judges of the circuit who are in regular active service."

/s/ IRVING R. KAUFMAN,
IRVING R. KAUFMAN,
Acting Chief Judge.

October 18, 1972

Decision of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

KAUFMAN, *Circuit Judge* (with whom Judges Mansfield and Mulligan concur):

It is unfortunate that our brothers Timbers and Oakes have chosen this case to express their disappointment over the result of the en banc vote. Although it is true that the Rule authorizes a rehearing en banc only when ordered by a "majority of the circuit judges who are in regular active service," 28 U.S.C. § 46, the governing statute, provides that a senior judge who sat in the original hearing of the case may, in the event the case is reheard en banc, vote on the merits of the appeal. Accordingly, it would be ironic if this case were en banced, as urged by Judges Timbers and Oakes, since a minority of the judges qualified to ultimately vote on the merits would carry the day. Moreover, it is not unreasonably presumptuous to predict that Judge Smith, who authored a thoroughly considered opinion for the panel, and Judge Moore, who concurred with him, would have opposed a rehearing en banc if given that opportunity, and would have adhered to their original views on the merits, had the case been reheard en banc, notwithstanding the sparse citation in our brother Timbers's opinion. In either instance, there would have been a majority voting against those who favored a rehearing en banc.[1]

[1] As for the contention in the dissenting opinion that "The issue is whether a 3-judge *minority*—on a court for which Congress has provided a 9-judge complement, 28 U.S.C. § 44(a) (1970)—may block the reconsideration en banc which the majority wants . . .," we call to our brothers' attention that four also is not a majority of either eight or nine. Surely the example posed by Judge Mansfield where only five judges in regular active service are available to vote on whether to order a rehearing en banc illustrates the inappropriateness of a simplistic "majority of those voting" criterion for Rule 35.

Decision of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

In view of the circumstances of this case, I fear our dissenting brothers have staked too much upon the label *senior* or *active*.

I fully concur in the views expressed in Judge Mansfield's opinion.

MANSFIELD, *Circuit Judge* (with whom Judges Kaufman and Mulligan concur):

I concur in the views expressed by Judge Kaufman.

The time may well have come for a Congressional review of Title 28 U. S. C. § 46(c) which governs en banc procedure in federal courts of appeal, because of its apparent inconsistency in declaring, on the one hand, that a senior judge who heard an appeal as a panel member may not participate in ordering it to be heard en banc but, on the other, that he may participate in an en banc reconsideration ordered by a vote of the "majority of the circuit judges of the circuit who are in active service." However, the dissent, by suggesting that the majority requirement can have an unfortunate or unfair impact in cases where less than the court's full complement of judges is available to vote misconceives the purpose of the statute and of Rule 35(a) enacted pursuant to it. In my view if the dissent's views were adopted, the objective of en banc procedure would be threatened.

The goal of § 46(c) and of Rule 35(a) is to achieve intracircuit uniformity by assuring that where questions of exceptional importance are presented the law of the circuit will be established by the vote of a majority of the full court rather than by a three-judge panel. H. R.

Rep. No. 1246, 77th Cong., 1st Sess. (1941); Hearings on S. 1053; before a Subcommittee of the Senate Committee, 77th Cong., 1st Sess. 14-16 (1941). The judges voting in favor of en banc in this case mistakenly described themselves as representing "the will of a majority of the Court". (Fn. 1). Actually they represent less than a majority. The issue here is whether four judges of a court with a nine-judge complement may force an en banc reconsideration that could result in the law of the circuit being determined by less than a majority of the court. If less than a majority could determine the law of the circuit, the purpose of en banc procedure would be eroded. Carried to its logicaly extreme it would mean that in a case where only five members of a nine-member court were available (either because of vacancies, disqualifications, illnesses or the like) the law of the circuit would be determined by the vote of only three. It was just to avoid such a possibility that Congress provided that a vote of a majority of the court's full complement should be required. The majority requirement serves the further salutary purpose of limiting en banc hearings to questions of exceptional importance rather than allow the court to drift into the unfortunate habit of requiring such hearings in every case where a minority of the court may desire a decision by the full court. At a time when the judicial work load of most courts of appeal is at an unprecedented high, sittings en banc should continue to remain the exception.

There is nothing unfair about the majority requirement, either generally or in this case. In cases of exceptional importance, or where there is a conflict between circuits, it

may be expected that the Supreme Court will grant certiorari and settle the questions in issue. For this reason this Circuit for many years did not hear appeals en banc, see *Lopinsky* v. *Hertz Drive-UR-Self Systems*, 194 F. 2d 422, 429 (2d Cir. 1951) (concurirng opinion of Judge Clark), preferring to adhere to panel decisions, at least where recent. See Schick, *Learned Hand's Court*, Johns Hopkins Press (1970) pp. 105, 115-120. As for the present case, as Judge Kaufman has observed, the ironic feature is that if the two senior judges who joined in the majority opinion were permitted a voice on the issue, it may reasonably be inferred that they would vote against hearing the appeal en banc.

TIMBERS, *Circuit Judge* (dissenting):

In this environmental suit involving alleged pollution of the waters of Lake Champlain, the late Chief Judge Leddy of the District Court for the District of Vermont reached his class action determination "with great reluctance". 53 F. R. D. 430, 433. In affirming the district court by a 2-1 vote, Judge Smith's forthright panel majority opinion acknowledged that "[w]e are confronted with the novel question whether a diversity case will be allowed to proceed as a class action under Fed. R. Civ. P. 23(b)(3) when the named plaintiffs meet the jurisdictional amount requirement of 28 U. S. C. § 1332(a) but the unnamed representatives of the class do not." ____ F. 2d at ____.

I have already expressed in my panel dissent, ____ F. 2d at ____, my views on this novel issue, the resolution of which will vitally affect the viability of the Rule 23(b)(3)

class action. The record in this case strikes me as a particularly good one on which to resolve this important issue. The facts are not in dispute. The legal question is starkly presented. The issue to be resolved is both important and sure to recur.

Finally, I think it is most unfortunate that en banc reconsideration of such a substantial question of unusual importance is being *denied* despite the 4-3 vote by the active judges of this Court *in favor* of en banc reconsideration. This comes about because there has been a vacancy on this nine judge Court for nearly a year and one of the eight active judges has abstained from voting in this case by reason of disqualification. Fed. R. App. P. 35(a) authorizes a rehearing en banc only when ordered by a "majority of the circuit judges who are in regular active service". With only eight active judges, when one judge by reason of disqualification is *excluded* from voting whether to en banc but is *included* in determining what constitutes a majority, then the rule appears to require five out of seven to en banc the case. Such a result seems to me to be most unfortunate in thwarting the clear intent of the rule. It is especially unfortunate here where the rule operates to permit a *minority* of the active judges of the Court to deny en banc reconsideration of one of the more pressing issues of our day—an issue to which the best thinking of legal scholars, lawyers and judges has been devoted.

I therefore respectfully but most emphatically dissent from the denial of reconsideration en banc.

I am authorized to state that Judge Oakes concurs in this dissenting opinion.[1]

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[1] We note that our colleagues, Judge Kaufman and Mansfield, have chosen to file opinions relating to our dissent.

We claim no omniscience as to how our colleagues, Senior Judges Moore and Smith, would vote on the merits in the event of a rehearing en banc in this case. That of course is *not* the issue to which our dissent is addressed. The issue is whether a 3-judge *minority*—on a Court for which Congress has provided a 9-judge complement, 28 U.S.C. § 44(a) (1970)—may block the reconsideration en banc which the majority wants of a substantial question of unusual importance. And as we all known, despite the guesswork of our colleagues as to how our Senior colleagues would vote if they could vote on whether to en banc, the fact is that not infrequently the author of the majority opinion of a divided panel has voted in favor of en banc reconsideration. See e.g., *Scenic Hudson II*, 453 F.2d 463, 494 (2 Cir. 1971), *cert. denied*, 407 U.S. 926 (1972), and other en banc cases. And there are times when judges change their minds on the merits of an issue. See, e.g., Waterman, J., concurring in *Local 1251, UAW* v. *Robertshaw Controls Co.*, 405 F.2d 29, 33 (2 Cir. 1968) (en banc), overruling *Zdanok* v. *Glidden Co.*, 288 F.2d 99 (2 Cir. 1961).

To the extent that Judges Kaufman and Mansfield believe that "[t]he time may well have come for a Congressional review" of that part of 28 U.S.C. § 46(c) (1970) that governs en banc procedure, we agree. Such review, in addition to considering the present anomaly by which a minority can thwart the will of a majority of the Court in determining whether en banc reconsideration is to be granted, might also appropriately address itself to the question whether, in en banc matters, all Senior judges who have elected to continue their judicial service pursuant to 28 U.S.C. § 294 (1970) should be fully enfranchised. Surely any Senior judge who sat on the original panel should be permitted to vote on whether to en banc the case (as he now is permitted to vote on the merits if the case is en banced).

APPENDIX C.

Decision of United States District Court for the District of Vermont

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

v.

INTERNATIONAL PAPER COMPANY.

Civil Action.

File No. 6192.

OPINION AND ORDER

Peter Langrock, Esq. and Mark Sperry, Esq., Langrock & Sperry, Middlebury, Vermont, for plaintiffs.

Henry Black, Esq., Black & Plante, White River Junction, Vermont, and Taggart Whipple, Esq., Richard Nolan, Esq., and Frank Ferony, Esq., Davis, Polk & Wardwell, New York, New York, for defendants.

LEDDY, *Chief Judge.*

This is a diversity action in which the plaintiffs seek compensatory and punitive damages for impairment of their property rights as a result of the defendant's alleged

pollution of Lake Champlain. The named plaintiffs, allegedly owners of lakefront property in Orwell, Vermont, seek to maintain this suit as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Plaintiffs allege that all lakefront landowners and lessees in the towns of Orwell, Shoreham, and Bridport, Vermont, numbering more than two hundred, are properly members of the class they seek to represent.

We must initially determine whether there is jurisdiction over all the members of the proposed class. The defendants contend that some members of the class are residents of New York and that the court does not have jurisdiction over these persons. This position is clearly untenable. One of the factors relied on by the Supreme Court in reaching its conclusion in *Snyder* v. *Harris*, 394 U. S. 332 (1969) was that:

> Under current doctrine, if one member of a class is of diverse citizenship from the class opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State. *See Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356 (1921)

394 U. S. at 340.

The defendant's contention that many members of the proposed class fail to meet the $10,000 jurisdictional amount is crucial, however. The sums in good faith claimed by the plaintiffs control the determination of jurisdictional amount unless "from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff[s] cannot recover the

amount claimed . . . ." *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 288-89 (1938). Applying this standard, we think that the named plaintiffs meet the jurisdictional amount. However, the named plaintiffs have made no allegations as to the damage sustained by each member of the proposed class. Indeed, it is unlikely that the property of every lakefront landowner in the towns of Orwell, Shoreham, and Bridport is valued at $10,000, and, to a legal certainty, it is not credible that every such owner has suffered pollution damage in excess of $10,000.

This action would have been considered a "spurious" class action under Rule 23 before its amendment in 1966, because the claims of the class members are separate and distinct. *See, e.g., Snyder* v. *Harris, supra*, 394 U. S. at 335-36. Thus the question is whether federal courts have jurisdiction over all members of an allegedly otherwise proper class, in a class suit in which the claims of the class members are separate and distinct, if some members of the class individually meet the jurisdictional requirement as to the amount in controversy and others, who are not named representatives, do not.

In *Snyder* v. *Harris, supra*, the Supreme Court held that aggregation of damages to satisfy the jurisdictional amount is not permissible in "spurious" class actions. This doctrine, the Court held, is based upon its prior interpretation of the statutory phrase "matter in controversy" in 28 U. S. C. § 1332(a) and its predecessors, rather than on Rule 23 or any other rule of procedure. The Court looked for interpretation of this phrase to *Troy Bank* v. *Whitehead & Co.*, 222 U. S. 39, 40 (1911), *Pinel* v. *Pinel*, 240 U. S. 594 (1916),

and *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939). All three of these cases state that *each* plaintiff must meet the jurisdictional amount. Both *Troy Bank* and *Pinel* were joinder cases, but *Snyder* stated that *Clark* applied this joinder doctrine to class actions (although we confess that we can find nothing in the official report of *Clark* clearly indicating that it was, in fact, a class action). Professor Wright notes that the "dissenters in Snyder thought that the rule there announced would apply 'in all cases where one or more of the co-plaintiffs has a claim of less than the jurisdictional amount . . . .'" Nevertheless, he claims that *Snyder* does not definitely decide the issue because "the majority did not speak to the point . . . ." C. Wright, *Handbook of the Law of Federal Courts* § 72, at 316 n. 86 (2d ed. 1970), *quoting* 394 U. S. at 343. On this we disagree, for we find the majority's language clear and unambiguous. We therefore think that *Snyder* precludes our obtaining jurisdiction over those members of the proposed class who do not meet the $10,000 jurisdictional requirement.

To be sure, the basis of *Snyder* is a reaffirmation of quite well settled law as applied to the amended Rule 23, whereas it has never been settled by a square holding that every unnamed class member in a spurious class suit must individually satisfy the jurisdictional monetary limitation. Neither *Snyder* nor *Clark* involved named plaintiffs all of whom met the jurisdictional amount. Before the amendment of Rule 23 in 1966 the majority of the case law held that only named plaintiffs (*i.e.*, the original parties and those who intervened under prior Rule 24) were bound by

the result of a spurious class action. *See* C. Wright, *supra*, § 72 at 310. As amended, Rule 23 provides that all members of a class who do not request exclusion are bound by the resulting judgment. Thus only after the 1966 amendment did the issue of whether an unnamed plaintiff was required independently to meet the jurisdictional amount becomes significant. The aggregation issue resolved in *Snyder*, however, was always important as it related to the jurisdictional requirements for named as well as unnamed plaintiffs. Nevertheless, despite this possible distinction, we feel bound by the clear language of the Supreme Court; accordingly we hold that each class member in a spurious class action must independently satisfy the requirement as to jurisdictional amount. Nor do we find room in the Court's language for the admittedly attractive distinction proposed by one commentator in discussing the jurisdictional requirements for intervention under the prior Rule 24: "Should a large number of claimants meet the jurisdictional requirements, a few claimants who do not meet them could be deemed within the ancillary jurisdiction of the court." G. Fraser, *Ancillary Jurisdiction and the Joinder of Claims* in the Federal Courts, 33 F. R. D. 27, 45 (1963) (footnote omitted).

We recognize that our decision today may conflict with that implied by Professor Moore's conclusion that in a Rule 23(b)(3) suit "the several claim or claims of or against each member of the class appearing of record as an *original party* [have] to equal or exceed the specified amount in controversy." 3B Moore's Federal Practice § 23.95 (2d ed. 1969) (emphasis added; footnote omitted). Professor Wright recognizes that there are "indications" that *Snyder*

will be interpreted as we have interpreted it, but argues that "this is not an inevitable conclusion and it would aggravate the damaging effect the Snyder decision had had on the attempt to modernize the law of class actions." C. Wright, *supra*, § 72 at 316. *But see* H. Hart & H. Wechsler, *The Federal Courts and the Federal System* 935-37 (1953).

Our holding is in accord with *Alvarez* v. *Pan American Life Ins. Co.*, 375 F. 2d 992, 996-97 (5th Cir.), *cert. denied*, 389 U. S. 827 (1967), although only one member of the class in *Alvarez* met the jurisdictional amount, and that member was not a named plaintiff, a possible distinction. *Lesch* v. *Chicago & E. I. R. R. Co.*, 279 F. Supp. 908, 912 (N. D. Ill. 1968), is a pre-*Snyder* opinion on all fours with the case at bar and *contra* to our holding. *Steele* v. *Guaranty Trust Co.*, 164 F. 2d 387, 388 (2d Cir. 1947), *Speed* v. *Transamerica Corp.*, 135 F. Supp. 176, 202 (D. Del. 1955), *modified*, 235 F. 2d 369 (3d Cir. 1956), and *Wagner* v. *Kemper*, 13 F. R. D. 128, 130 (W. D. No. 1952), stated that the requisite jurisdictional amount had to be met by intervenors in a spurious class action under prior Rule 24. *Amen* v. *Black*, 234 F. 2d 12 (10th Cir.), *cert. granted to determine jurisdictional question*, 352 U. S. 888 (1956), *remanded because of settlement*, 355 U. S. 600 (1958), and *Shipley* v. *Pittsburgh & L. E. R. Co.*, 70 F. Supp. 870, 876 (1947), are *contra* to *Steele* and *Wagner*. *See generally McGrath* v. *Tadayasu Abo*, 186 F. 2d 766, 770-71 (9th Cir.), *cert denied*, 342 U. S. 832 (1951); *Knowles* v. *War Damage Corp.*, 171 F. 2d 15, 18 (D. C. Cir. 1948), *cert. denied*, 336 U. S. 914 (1949); *Hackner* v. *Guaranty Trust Co.*, 117 F. 2d 95, 97 (2d Cir.), *cert. denied*, 313 U. S. 559 (1941); *Mutation Mink Breeders Ass'n v. Lou Nierenberg Corp.*, 23 F. R. D. 155, 162 (S. D.

N. Y. 1959). There are also a number of relatively recent cases in which courts of appeals, without referring to the point, have assumed either that all class members must meet the jurisdictional amount, or that only one class member must do so. In at least some of these cases it appears that the assumption was made only *arguendo*. *See Lonnquist* v. *J. C. Penney Co.*, 421 F. 2d 597, 599-600 (10th Cir. 1970) (assumes one class member suffices); *Dierks* v. *Thompson*, 414 F. 2d 453, 456 (1st Cir. 1969) (assumes all class members must meet amount); *Potrero Hill Community Action Comm.* v. *Housing Authority*, 410 F. 2d 974, 978 (9th Cir. 1969) (assumes one class member suffices).

We reach our decision today with great reluctance. For if a construction of Rule 23 were controlling, rather than the phrase "amount in controversy" in the jurisdictional statute, our decision would be different. Rule 23 contemplates a suit brought by representatives of an appropriately defined class; members of the class other than the named representatives need never come into court. In fact, the court may not even know the identity of the unnamed plaintiffs: notice of the action may be by publication if individual notice is not feasible. Thus the requirement that each class member meet the jurisdictional amount clearly undermines the usefulness of Rule 23(b)(3) class suits, because the problem of defining an appropriate class over which the court has jurisdiction will often prove insuperable.[1]

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[1] *Cf.* C. Wright, *Handbook of the Law of Federal Courts* § 72, at 316 (2d ed. 1970) (emphasis added; footnote omitted): "There are indication that [*Snyder*] also means that [Rule 23(b)(3)] cannot be used in diversity cases save for the *extraordinary situation* in which every member of the class has a claim in excess of $10,000 . . ."

Indeed, we think this problem is insuperable in the case at bar, for we can find no appropriate class over which we have jurisdiction. A class defined as all lakefront landowners and lessees in the towns of Orwell, Shoreham, and Bridport having $10,000 in controversy would not be feasible. The class would have to be further defined either before or after trial on the liability issue. A determination before trial of the landowners actually encompassed within this class would require the unnamed class members to appear and at least plead, and perhaps prove facts substantiating, an amount in controversy. This would eliminate any advantage of a class action over joinder; a class action would therefore not be properly maintainable because class treatment would not be "superior to other available methods for the fair and efficient adjudication of the controversy," as required by Rule 23(b)(3). Nor could further definition of the class be postponed until after the trial on the liability issue. As the notes of the advisory committee indicate, the 1966 revision of Rule 23 was meant to exclude "one-way intervention" and to lessen problems relating to the *res judicata* effect of judgments. But if liability were found not to exist in the case at bar, the *res judicata* effect of the judgment would depend on an evaluation at some future date of whether a given class member had $10,000 in controversy at the time of this action. This is clearly an impossible task. And if liability were found to exist, the question of jurisdiction would be hopelessly interwined with the determination of damages, despite the fact that the "inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith as oust the jurisdiction." *St. Paul Mercury Indemnity Co.* v. *Red Cab Co., supra*, 303 U. S. at 289 (footnote omitted).

Accordingly, it is hereby ordered that reference to all persons other than the four named plaintiffs is strictly from the complaint and that this action will not be permitted to proceed as a class action.

AMENDMENT TO OPINION AND ORDER

Peter Langrock, Esq. and Mark Sperry, Esq., Langrock & Sperry, Middlebury, Vermont, for plaintiffs.

Henry Black, Esq., Black & Plante, White River Junction, Vermont, and Taggart Whipple, Esq., Richard Nolan, Esq., and Frank Ferony, Esq., Davis, Polk & Wardwell, New York, New York, for defendants.

LEDDY, *Chief Judge.*

This court's opinion and order of September 30, 1971, are hereby amended by adding at the end thereof the following:

Application for Certification Under 28 U. S. C. §1292(b)

Plaintiffs have moved that this court amend its previous order so as to permit appeal under 28 U. S. C. § 1292(b). Although we recognize that appeals under section 1292(b) should be granted only in very limited cases, *Gottesison* v. *General Motors Corp.*, 268 F. 2d 194 (2d Cir. 1970, we believe that the instant case is one to which it is improperly applied.

We assume, without deciding, that our order denying class treatment is interlocutory rather than final in nature. *See generally Caceres* v. *International Air Transport Ass'n*, 422 F. 2d 141 (1970), and cases cited therein. Our order

involves a controlling question of law, *vis.* "whether federal courts have jurisdiction over all members of an allegedly otherwise proper class, in a class suit in which the claims of the class members are separate and distinct, if some members of the class individually meet the jurisdictional requirements as to the amount in controversy and others, who are not named representatives, do not." Page 3 of original opinion. That there is a substantial ground for difference of opinion as to this question is clear from the authority cited in our opinion which is *contra* to our holding, although we find this authority unconvincing. Defendants contend, however, that the required "controlling question of law" must relate to the merits of the action for an order to be appeable under section 1292(b). Whether or not orders striking class action allegations can be so characterized, such orders certainly do not "only relate to pretrial procedures" as did the order in *Switzerland Cheese Ass'n, Inc.* v. *E. Horne's Market, Inc.*, 385 U. S. 23 (1966). In that case the Supreme Court held that an order denying summary judgment on the basis of the existence of a triable issue of fact was not appealable under 28 U. S.C. § 1292(a)(1), which provides for appeals as of right from interlocutory orders affecting injunctions. The Second Circuit, moreover, has indicated that it considers class action orders appealable under section 1292(b) in a proper case. In *Caceres* v. *International Air Transport Ass'n, supra*, 422 F. 2d at 144, the Second Circuit held that not every class action order is appealable as of right under 28 U. S. C. § 1291. If every such order were appealable as of right, the court reasoned, discretionary appeal under section 1292(b) would be unnecessary, whereas the latter procedure was considered a proper and preferable approach.

Finally, we also think that an immediate appeal on the propriety of class treatment may materially advance the ultimate termination of the litigation. This case involves a particularly complicated issue of liability and is likely to involve protracted and costly litigation. If our opinion as to the jurisdictional requirements for Rule 23(b)(3) class suits is erroneous, reversal after trial on the merits may require a new trial, and failure of the named plaintiffs to prosecute an appeal on our ruling may result in a multiplicity of protracted suits by other members of the proposed class.[1]

Accordingly, plantiffs' motion is granted.

This amendment shall be an addition to and an integral part of the opinion and order in the above case dated and filed on September 30, 1971.

Done at Burlington in the District of Vermont, this 21st day of October, 1971.

BERNARD J. LEDDY,
Chief Judge.

Endorsed: Filed October 21, 1971.
Edward J. Trudell,
Clerk.

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[1] *See Comment, Interlocutory Appeals from Orders Striking Class Action Allegations,* 70 Colum. L. Rev. 1292, 1293-94 (1970) (footnote omitted)

> Even if the named plaintiff . . . succeeds on the merits in his individual capacity, he may then abandon his original goal of reducing his own expenses by representing a class rather than pay the costs of an appeal that might possibly fail to win a reversal of the order. The remainder of the class wou'd consequently be left without a representative or "champion." On the other hand, if the named plaintiff does appeal the order after prevailing on the merits, his success on appeal may be a dubious blessing from his point of view; he may be permitted to represent the class but be required to prosecute a new trial. [The commentator then states the reasons why a new trial may be required.]

In the

Supreme Court of the United States

October Term, 1972

No. 888

H. Keith Zahn and Valerie Zahn, Charles Lemire and Marion L. Lemire, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Petitioners,

—v.—

International Paper Company,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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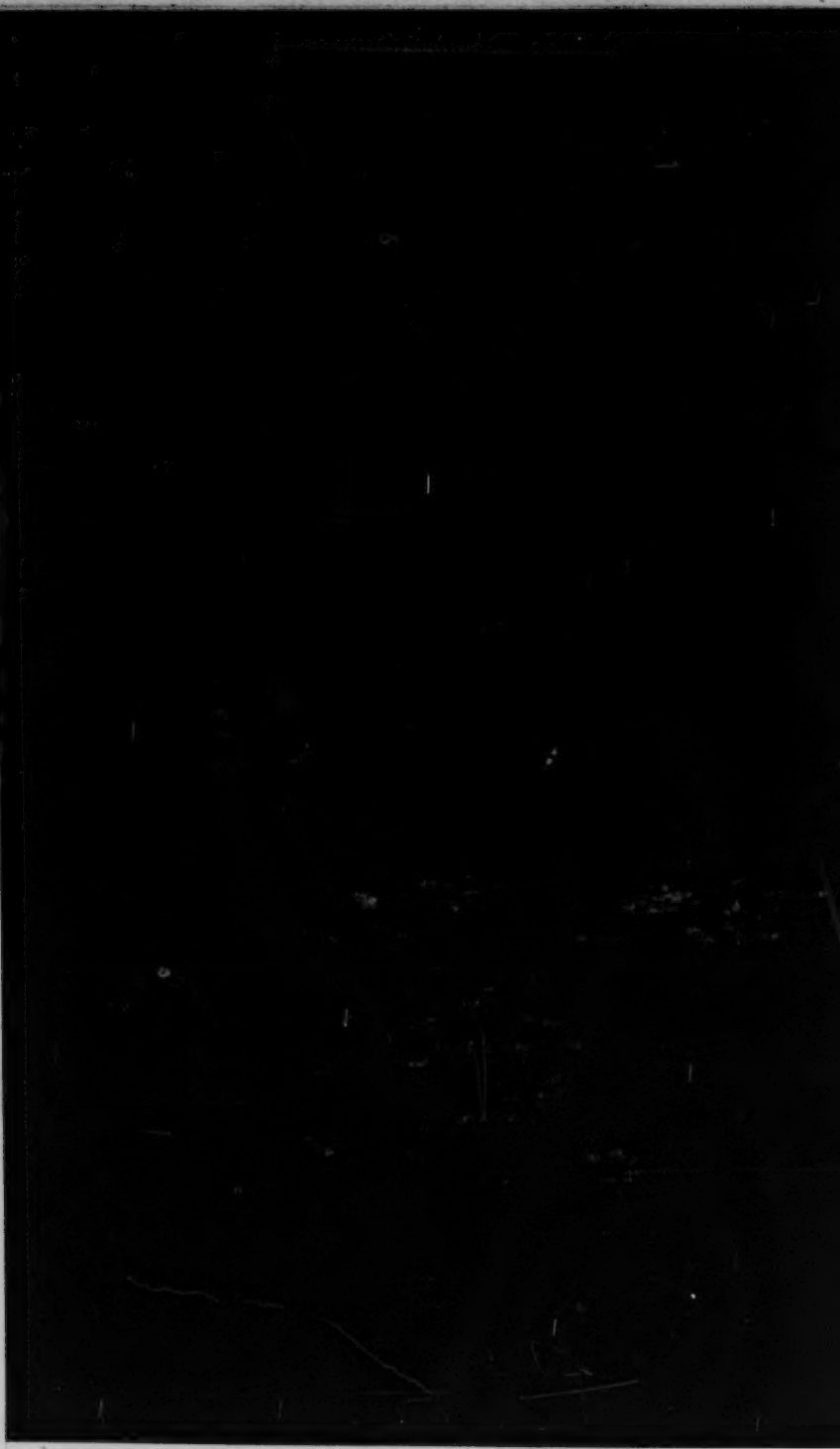

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Petitioners,

—v.—

INTERNATIONAL PAPER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

As stated by the Court of Appeals, the question presented is "whether a diversity case will be allowed to proceed as a class action under Fed. R. Civ. P. 23(b)(3) when the named plaintiffs meet the jurisdictional amount requirement of 28 U.S.C. §1332(a) but the unnamed representatives of the class do not." (Petition, Appendix A, at 16.)

STATUTES AND RULES INVOLVED

The pertinent provisions of 28 U.S.C. §1332(a) and Fed. R. Civ. P. 23 are set forth in the Petition at pp. 3-4.

Also involved is Fed. R. Civ. P. 82 which provides:

"JURISDICTION AND VENUE UNAFFECTED

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . ."

and 28 U.S.C. §2072 which provides in pertinent part:

"Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

• • • • •"

STATEMENT OF THE CASE

This action, brought by four named owners of lakefront property on the Vermont side of Lake Champlain on behalf of themselves and some 200 other similarly situated riparian landowners and lessees, seeks compensatory and punitive damages for alleged injury to their property and leaseholds caused by the alleged pollution of the Lake's waters from the operation of Respondent's now-closed pulp and paper manufacturing plant at Ticonderoga, New York. The action apparently is based on theories of common law trespass and nuisance and seeks to invoke federal jurisdiction on the basis of diversity of citizenship and requisite monetary amount under 28 U.S.C. §1332(a). The complaint alleges that the four named plaintiffs each suffered damages in excess of $10,000 but contains no allegations as to the damages of the unnamed members of the proposed class.

The District Court held that this suit may not be maintained as a class action under Fed. R. Civ. P. 23, applying the principle of *Snyder* v. *Harris*, 394 U.S. 332 (1969), that

> "each class member in a spurious class action must independently satisfy the requirement as to jurisdictional amount." (Petition, Appendix C, at 44.)

Judge Leddy found that in this case

> "it is unlikely that the property of every lakefront landowner in the towns of Orwell, Shoreham, and Bridport is valued at $10,000, and, to a legal certainty, it is not credible that every such owner has suffered pollution damage in excess of $10,000." (Petition, Appendix C, at 42.)

Under these circumstances, he concluded that the problem of defining a class was "insuperable". (Petition, Appendix C, at 47.) He also concluded that any attempted definition of the class before trial by requiring each member of the class to show the amount of his damages

> "would eliminate any advantage of a class action over joinder" (*Id.*)

and thus be improper under the Rule 23(b)(3) requirement that class action treatment be superior to other methods of adjudication. (*Id.*) He further concluded that definition of the class could not be postponed until after trial on the issue of liability because if liability were found not to exist

> "the *res judicata* effect of the judgment would depend on an evaluation at some future date of whether a given class member had $10,000 in controversy at the time of this action." (*Id.*)

If, on the other hand, liability were found to exist,

> "the question of jurisdiction would be hopelessly intertwined with the determination of damages." (*Id.*)

The Court held that such an *ex post facto* determination of whether a party had been a member of the class would be "an impossible task" and contrary to the purpose of Rule 23 as amended in 1966. (*Id.*)

The District Court's order was affirmed by the Court of Appeals for the Second Circuit on interlocutory appeal pursuant to 28 U.S.C. §1292(b), with Judge Timbers dissenting. While acknowledging that *Snyder* does not squarely hold that every unnamed member of the class in a spurious class suit must satisfy the jurisdictional amount

requirement (Petition, Appendix A, at 18), the majority considered that Petitioners' attempt to escape the ambit of *Snyder* by arguing that only *some* of the plaintiffs need meet the jurisdictional amount requirement—the same argument they make here—was met by persuasive internal evidence that this Court did not so limit the rule enunciated in *Snyder*. (Petition, Appendix A, at 18-20.)

The Court of Appeals noted that in *Snyder* this Court "stressed that the aggregation doctrine, grounded in the statutory phrase 'matter in controversy', far antedated Rule 23." (Petition, Appendix A, at 19.) In support of its position in *Snyder*, this Court relied on *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939). The Court of Appeals observed that this "Court's reliance on *Clark* appears to offer an insurmountable obstacle to appellants, for the *Clark* Court had recognized that one originally named member of the proposed class might meet the jurisdictional amount requirement, just as the named plaintiffs do here; yet the action was dismissed as to all plaintiffs except one." (Petition, Appendix A, at 19-20.) As the Court of Appeals emphasized, the "point is that in a spurious class action one plaintiff may not ride in on another's coattails." (Petition, Appendix A, at 20.)

While recognizing that amended Rule 23 should be given a liberal interpretation in order to vindicate small federal claims, the Court of Appeals held that the policies underlying the Rule are not determinative of the case at bar. Rather, in light of *Snyder* the fundamental consideration must be 28 U.S.C. §1332(a). (Petition, Appendix A, at 20.) The purpose of the jurisdictional amount requirement in that Section was found to be advanced by denying class action treatment here, for the class action—with approxi-

mately 200 separate and distinct claims—would be "enormously time consuming". (Petition, Appendix A, at 21.) The Court of Appeals also observed that "the Advisory Committee did not intend that Rule 23(b)(3) ordinarily be utilized in a mass tort situation." (Petition, Appendix A, at 21.)

Judge Timbers' dissent argued that under ancillary jurisdiction concepts the class action should be permitted to continue. (Petition, Appendix A, at 22-31.)

ARGUMENT

The Question Presented Is Governed by *Snyder* v. *Harris* and Hence Does Not Warrant Consideration by This Court.

Since 1832 the settled doctrine in the federal courts has been that separate and distinct claims joined in a single action, whether or not such action is designated as a "class", must each meet any Congressionally established jurisdictional amount. *See e.g., Snyder* v. *Harris,* 394 U.S. 332 (1969); *Pinel* v. *Pinel,* 240 U.S. 594 (1916); *Oliver* v. *Alexander,* 31 U.S. 143 (1832); *Steele* v. *Guaranty Trust Co. of New York,* 164 F.2d 387 (2d Cir. 1947), *cert. denied,* 333 U.S. 843 (1948); *Hackner* v. *Guaranty Trust Co. of New York,* 117 F.2d 95 (2d Cir.), *cert. denied,* 313 U.S. 559 (1941). This rule has not been altered and logically could not have been altered by the 1966 amendments to Rule 23. Despite the explicit warning in Rule 82 that the Federal Rules of Civil Procedure ". . . shall not be construed to extend . . . the jurisdiction of the United States district courts . . .", some proponents of "liberalization" through

the magic of amended Rule 23 seem to think that this Rule has created a single mass of which only the front need appear, and only that front need meet the jurisdictional amount. But as a matter of logic and consistent interpretation, the unnamed members of a spurious class are just as obliged to meet statutory jurisdictional requirements as are the named plaintiffs. Anonymity cannot defeat a Congressional requirement deliberately enacted and re-enacted several times for the purposes of making the federal court calendars workable and relegating small claims to the state courts, particularly in diversity cases. *See* S. Rep. No. 1830, 85th Cong., 2d Sess. (1958); in 2 U.S. Code Cong. & Adm. News 3099, 3100-01 (1958).

The question presented here is answered by the principles laid down in *Snyder* v. *Harris*, 394 U.S. 332 (1969). As the Court of Appeals stated, there is "persuasive internal evidence" in the *Snyder* opinion that the rule there enunciated requires that *each* member of a spurious class satisfy the jurisdictional amount requirement. (Petition, Appendix A, at 19.)

This interpretation of *Snyder* is further supported by the reliance in the *Snyder* opinion on *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939), where the fact that a named plaintiff had a claim in the jurisdictional amount was not enough to save the jurisdictionally deficient claims of other potential plaintiffs. We submit that there is no valid reason why this Court now should reconsider its holdings in *Snyder* and *Clark*.

The dissenting opinion of Judge Timbers does not appear to question that *Snyder* imposes a jurisdictional amount requirement on unnamed plaintiffs in a spurious class, but rather suggests that where at least one named

plaintiff meets this requirement, *Snyder* can be avoided by the device of ancillary jurisdiction. (Petition, Appendix A, at 22 *et seq.*) But to reach this conclusion, as Petitioners urge here, the principles laid down in *Snyder* must be disregarded; and *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939) and *Alvarez* v. *Pan American Life Insurance Co.*, 375 F.2d 992 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967), in both of which at least one of the plaintiffs had a claim in the requisite amount, must be overruled.

The effect of the *Snyder* doctrine as applied by the Court of Appeals in this case is not, as Petitioners contend, to render "the class action device unavailable to the small claimant". (Petition, at 8.) Principles of non-aggregation have not affected and do not affect true and hybrid class actions, and they affect spurious class actions only where Congress has established a jurisdictional amount requirement. The very same contentions here advanced by Petitioners were put forward in *Snyder* (394 U.S. at 338) and rejected, with this Court stating that those contentions are not sufficient to justify the Court's abandoning a judicial interpretation of Congressional language that has stood for more than a century and a half. (394 U.S. at 338-39) To give way to those contentions now would, as in *Snyder*,

> "allow aggregation of practically any claims of any parties that for any reason happen to be brought together in a single action. This would seriously undercut the purpose of the jurisdictional amount requirement . . . . [and] add to the burdens of an already overloaded federal court system" (394 U.S. at 340-341)

and further would expand the jurisdiction of the federal courts in violation of 28 U.S.C. §2072 and Fed. R. Civ. P. 82. (394 U.S. at 341)

In short, Petitioners have asserted no compelling reason why this Court should now review and re-evaluate the policy considerations already raised and thoroughly examined in *Snyder*.

Nor does Petitioners' ancillary jurisdiction argument warrant review by this Court. The narrow question posed by Petitioners is whether it was improper for the District Court to fail to invoke the principle of ancillary jurisdiction in order to evade the jurisdictional amount requirement of 28 U.S.C. §1332(a). The short answer is that *Snyder* and its predecessors do not permit such judicial expansion of the limited diversity jurisdiction granted by Congress under 28 U.S.C. §1332(a).

There is no basis to Petitioners' contention (Petition, at 10) that the lower courts "are already split" on the ancillary jurisdiction question and that this Court should resolve the "split". In fact, resolution is not necessary because there is no conflict. The courts of appeals which have previously passed on the question are in agreement that ancillary jurisdiction cannot be used to permit joinder of plaintiffs having separate and distinct claims which do not meet the jurisdictional amount. *Hymer* v. *Chai*, 407 F.2d 136 (9th Cir. 1969); *Aetna Insurance Co.* v. *Chicago, R.I. & P. R.R.*, 229 F.2d 584 (10th Cir. 1956); *Hackner* v. *Guaranty Trust Co. of New York*, 117 F.2d 95 (2d Cir.), *cert. denied*, 313 U.S. 559 (1941); *Takashi Kataoka* v. *May Department Stores Co.*, 115 F.2d 521 (9th Cir. 1940), *cert. denied*, 312 U.S. 700 (1941).

This uniformity in the decisions of the courts of appeals is not undermined by the cases cited by Petitioners in support of their assertion that there is a split in the "courts below". (Petition, at 10.) Of the cases cited by

Petitioners, several involve derivative claims coupled with special relationships (*e.g.*, husband and wife, guardian and child)—not separate and distinct claims as in the case at bar—and therefore are inapposite. *Hatridge* v. *Aetna Casualty & Surety Co.*, 415 F.2d 809 (8th Cir. 1969); *Wilson* v. *American Chain & Cable Co.*, 364 F.2d 558 (3d Cir. 1966); *Wiggs* v. *City of Tullahoma*, 261 F.Supp. 821 (E.D. Tenn. 1966). The other cases cited by Petitioners in support of their position involving joinder of plaintiffs (Petition, at 10) are district court cases (*Lucas* v. *Seagrave Corp.*, 277 F.Supp. 338 (D. Minn. 1967); *Johns-Manville Sales Corp.* v. *Chicago Title & Trust Co.*, 261 F. Supp. 905 (N.D. Ill. 1966)) and do not warrant the grant of certiorari here. R. Stern and E. Gressman, SUPREME COURT PRACTICE 162 (4th ed., 1969).

None of the remaining cases cited by Petitioners (Petition, at 10) as representing a "split" of authority dealt with the issue of joinder of plaintiffs, where the matter of jurisdictional amount would be relevant. *General Research, Inc.* v. *American Employers' Insurance Co.*, 289 F.Supp. 735 (W.D. Michigan 1968), *Jacobson* v. *Atlantic City Hospital*, 392 F.2d 149 (3d Cir. 1968) and *Stone* v. *Stone*, 405 F.2d 94 (4th Cir. 1968) are cases in which ancillary jurisdiction was used to facilitate the joinder of defendants. *Jewell* v. *Grain Dealers Mutual Insurance Co.*, 290 F.2d 11 (5th Cir. 1961), advanced by Petitioners as a contrary decision, involved the rejection of joinder of defendants. Even if these cases constitute a conflict in the lower courts on the question of joinder of defendants, that question is not presented by this case, which involves the quite different issue of the formation of a class of plaintiffs under Fed. R. Civ. P. 23(b)(3) in a mass tort action. The policy reasons

which favor allowing a single plaintiff to join in one action his claims against many defendants who have all injured him in the course of a single transaction are quite different from those with respect to joinder of a multitude of otherwise unrelated plaintiffs, each with a separate and distinct claim, in connection with a mass tort action under Rule 23 (b)(3).

United Mine Workers of America v. *Gibbs*, 383 U.S. 715 (1966), cited by the dissent (Petition, Appendix A, at 25-27, 29, 30) does not support Petitioners' argument that the doctrine of ancillary jurisdiction permits the inclusion in a spurious class action based on diversity jurisdiction of persons whose separate and distinct claims are not in excess of $10,000. At issue in *Gibbs* was the joinder of *claims* (pendent jurisdiction) rather than joinder of *plaintiffs* (ancillary jurisdiction) so there was no reason for *Gibbs* to consider 28 U.S.C. §1332(a).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Dated: New York, New York
January 8, 1973

Respectfully submitted,

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CERTIFICATE OF SERVICE UNDER RULE 33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Petitioners,

—v.—

INTERNATIONAL PAPER COMPANY,

Respondent.

RICHARD E. NOLAN, one of the attorneys for respondent, International Paper Company, and a member of the Bar of this Court, certifies that on the 8th day of January, 1973 three copies of the Brief in Opposition to Petition for Certiorari were served on Peter F. Langrock, Esq., Langrock and Sperry, Drawer 351, Middlebury, Vermont 05753, attorney for Petitioners, by depositing the same in a mail box maintained by the United States Postal Service at One Chase Manhattan Plaza, New York, New York 10005, with first class postage prepaid.

January 8, 1973

s/ RICHARD E. NOLAN
Richard E. Nolan

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IN THE

Supreme Court of the United States

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Petitioners,

v.

INTERNATIONAL PAPER COMPANY.

MOTION OF NATIONAL COUNCIL OF SENIOR CITIZENS AND CONSUMER FEDERATION OF AMERICA FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The National Council of Senior Citizens and the Consumer Federation of America hereby respectfully move for leave to file the attached brief *amici curiae* in support of the petition for a writ of certiorari in this case. The consent of the petitioners has been obtained and has been filed with the Clerk of this Court. The consent of the respondent was requested but denied.

The National Council of Senior Citizens is a coalition of organizations throughout the United States representing over 2,500,000 elderly citizens.

The Consumer Federation of America is a federation of national, state, regional and community consumer organizations consisting of 196 organizations in every state, except Hawaii, and the District of Columbia. The Federation was organized and is run to protect consumers. The organizations which are members of the Federation have over 38-million members.

The immediate interest of the National Council of Senior Citizens and Consumer Federation of America arises from the fact that they are appellants in eight actions presently in the United States Court of Appeals for the District of Columbia and the United States District Court for the District of Columbia, in which the controlling question of law is almost identical to that presented for review in the present case. These cases were brought against eight drug companies to recover tens of millions of dollars paid by purchasers for drugs which were found by the Food and Drug Administration to be ineffective.

We respectfully submit that the brief *amici curiae* which the National Council of Senior Citizens and the Consumer Federation of America seek permission to file will materially assist the Court in appreciating the full impact of the decision below and the need for its review.

BRUCE J. TERRIS
HELEN COHN NEEDHAM

Attorneys for
National Council of
Senior Citizens
Consumer Federation of
America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF NATIONAL COUNCIL OF SENIOR CITIZENS AND CONSUMER FEDERATION OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST OF AMICI CURIAE

The interest of the National Council of Senior Citizens and the Consumer Federation of America is described in the Motion for Leave to File Brief Amici Curiae above.

REASONS FOR GRANTING THE WRIT

The National Council for Senior Citizens and the Consumer Federation of America filed eight class actions in the District Court for the District of Columbia on behalf of all purchasers of over 100 specified drugs. These drugs have been found ineffective and ineffective as to combination by the Food and Drug Administration. The class actions seek to recover monies paid by purchasers of these improperly sold drugs from eight drug companies. Each suit is based on identical legal theories. Motions to dismiss were filed in three of the suits[1] and although denied, the cases were ordered transferred to the Superior Court for the District of Columbia, in accordance with 11 D.C. Code 922, because of the named plaintiffs' failure to meet the requisite jurisdictional amount.

Subsequently plaintiffs sought to amend two of these complaints to add Dade County, Florida as a plaintiff and to amend all three of the complaints to add the District of Columbia as a plaintiff. Dade County claims damages in excess of $10,000 in one suit and $50,000 in the other. The District of Columbia claimed damages in excess of $50,000 in each suit. In a memorandum opinion which is attached, the district court denied leave to amend. The court ruled that in an otherwise proper class action federal courts do not have jurisdiction over members of a class who themselves do not possess the jurisdictional amount even though named plaintiffs satisfy the jurisdictional requirements.

The district court's determination was based in great part on the decision of the court below in the present litigation. The district court acknowledged that "[t]he dissent in *Zahn* appears to be the better reasoned view, but in the circumstances the court feels that it is bound by the decided case."

---

[1] The remaining five suits were held in abeyance by stipulation.

No purpose is served by the rule espoused by the panel of the Court of Appeals for the Second Circuit and hesitantly followed by the District Court for the District of Columbia. In both the case at bar and the litigation to which amici curiae are parties, all plaintiffs have the identical causes of action and seek the same relief, based on the same course of conduct by the defendants. The only differences between plaintiffs is in the amount of their alleged damage.

In the case presently under consideration, the holding of the lower court gives plaintiffs two options. Either those members of the class who satisfy the requisite jurisdictional amount can waive their right to sue in federal court in order to maintain a single class action in state court or they can exercise their right to sue in federal court while the remaining class members sue in state court. If the latter option is taken, two identical and often complex class motions would be brought in two courts resulting in totally unnecessary burden and expense to both the parties and the state and federal courts.

In the cases to which amici curiae are parties in the District of Columbia, such duplication is not merely possible, but is inevitable. 11 D.C. Code 501(4) requires that suits for amounts in excess of $50,000 be filed in federal court until July, 1973. 11 D.C. Code 921(a)(2), however, requires that suits below that amount must be brought in the Superior Court for the District of Columbia. Thus, under the decisions of the Court of Appeals for the Second Circuit and the District Court for the District of Columbia, there is no choice but to bring two suits with identical causes of actions and identical requests for relief, based on the same course of conduct by identical defendants.

Such duplication of litigation serves no purpose. The reason for the jurisdictional amount requirement is to

reduce the litigation brought before federal courts by denying jurisdiction in cases involving small amounts of damages. It is questionable whether the decision below will accomplish this. If plaintiffs with damages over the jurisdictional amount decide not to waive their right to sue in federal court, the burden on the federal courts will remain constant while the state courts and the local courts of the District of Columbia will be needlessly burdened by additional litigation.

Moreover, while the decision of the Court of Appeals for the Second Circuit does not further the purpose of the jurisdictional amount requirement, it would have a disastrous impact on class actions. One of the historic uses of class actions is to enable those with small claims to band together when the individual amounts at stake make it impracticable to bring separate suit. Thus, the costs of suit would be absorbed by the entire class. If half the class must sue in one court and half in another, the costs are doubled and the financial burden may become so great that numerous litigants with small claims, or nonprofit organizations (like the amici curiae) representing such individuals, could not even contemplate bringing suit for redress of their grievances. This would be especially true with respect to consumer class actions where the legal issues are often difficult, the suits lengthy, and the costs enormous.

Furthermore, the decision of the Court of Appeals for the Second Circuit may even result in an inability to define any class. Having found that each plaintiff in a class action must have the jurisdictional amount, the district court concluded that it therefore followed that no class action, even limited to such plaintiffs, could be brought in federal court. It reasoned that no class could be ascertained, prior to trial on the issue of liability, without the appearance of each class member to substantiating his or her amount in controversy, and that

definition could not be postponed until after liability was determined without hopeless confusion. (Pet. at 47). This ruling would totally eliminate any class actions in federal court brought under statutes which have a jurisdictional amount. This ruling further demonstrates that the decision below is of far-reaching implications for major consumer litigation and, even more broadly, for use of class actions in the federal courts.

CONCLUSION

For the foregoing reasons, we respectfully urge that the petition for a writ of certiorari should be granted.

BRUCE J. TERRIS
HELEN COHN NEEDHAM

Attorneys for
National Council of
Senior Citizens
Consumer Federation of
America

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2198-71

CONSUMER FEDERATION OF AMERICA, *et al.*,
Plaintiffs,

v.

WYETH LABORATORIES, *et al.*,
Defendants.

Civil Action No. 304-72

CONSUMER FEDERATION OF AMERICA, *et al.*,
Plaintiffs,

v.

ELI LILLY AND COMPANY,
Defendant.

Civil Action No. 306-72

CONSUMER FEDERATION OF AMERICA, *et al.*,
Plaintiffs,

v.

UPJOHN COMPANY,
Defendant.

MEMORANDUM AND ORDER

Before the court are the plaintiffs' motions for leave to amend the complaint and for reconsideration of the court's order transferring these civil actions to the Superior Court. Also before the court in Civil Actions No. 304-72 and 306-72 are the defendants' motions to disallow the amendment to the complaint adding Dade County as a plaintiff.

The principal issue raised by the defendants is whether the addition of parties plaintiff who meet the $50,000 jurisdictional amount will cure jurisdictional defects as to the original plaintiffs who do not meet that amount. The court is of the opinion that the weight of authority is against the plaintiffs who seek to use this device. *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939); *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Alvarez* v. *Pan American Life Ins. Co.*, 375 F.2d 992 (5th Cir. 1967), *cert. denied*, 389 U.S. 827 (1967); *Zahn* v. *International Paper Co.*, No. 71-2157 (2d Cir. Sept. 7, 1972).[1]

Since the court has determined that the addition of Dade County and the District of Columbia would not enable the present plaintiff to remain in this court as either plaintiffs or intervenors under the cases cited above, the court will not allow the amendments to the complaint since to do so would prevent transfer to Superior Court of these civil actions pursuant to D.C. Code § 11-922 (1967 Supp. V).

Therefore, it is this 19th day of October, 1972,

ORDERED:

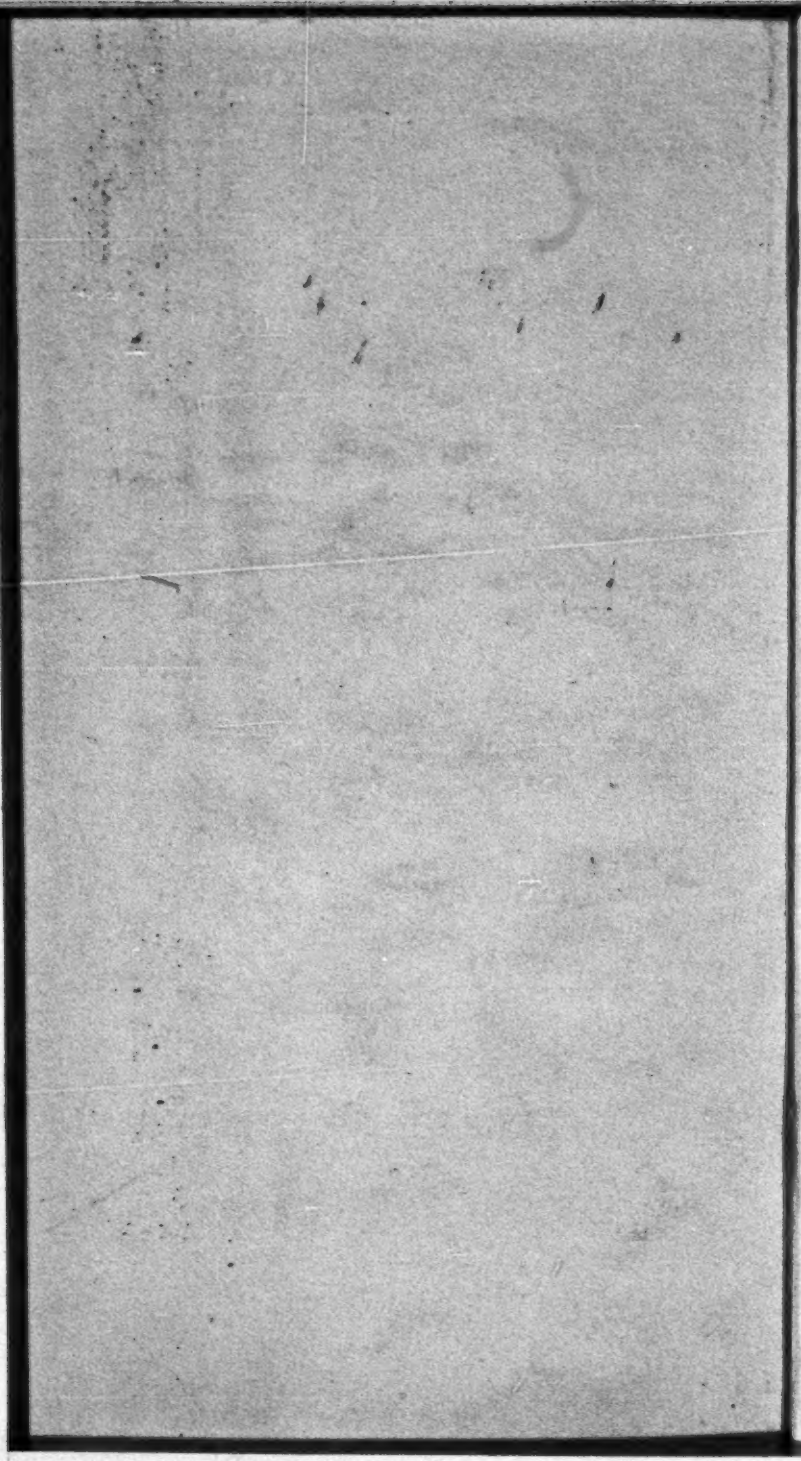
1. That plaintiffs' motions for leave to amend and reconsideration are denied.

2. Defendant's motion to disallow the amendment to the complaint is granted.

3. The clerk is directed to transfer these civil actions to the Superior Court of the District of Columbia.

/s/ William B. Bryant
Judge

[1] The dissent in *Zahn* appears to be the better reasoned view, but in the circumstances the court feels that it is bound by the decided case.



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IN THE

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v.

INTERNATIONAL PAPER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS-APPELLANTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS-APPELLANTS

Opinion Below

The United States Court of Appeals for the Second Circuit is reported as *Zahn v. International Paper Company*, 469 F. 2d 1033 (2d. Circuit 1972), affirming the opinion of the United States District Court for the District of Vermont, that opinion being reported at 53 F. R. D. 430 (D. Vt. 1971).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit became final October 18, 1972. A Petition for a Writ of Certiorari was filed December 16, 1972, and was granted February 20, 1973. The jurisdiction of this court rests on 28 U. S. C. 1254 (1).

Statutes and Rules Involved

The statutes and rules involved in this matter are as follows:

28 U. S. C. A. 1332. *Diversity of citizenship; amount in controversy; costs.*

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different states;

(2) citizens of a State, and foreign states or citizens of subjects thereof; and

(3) citizens of different States in which foreign states or citizens or subjects thereof are additional parties.

(b) Omitted—is not relevant

(c) Omitted—is not relevant

(d) Omitted—is not relevant

Fed. R. Civ. P. 18—*Joinder of Claims and Remedies.*

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal equitable, or maritime, as he has against an opposing party.

(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action, but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money. As amended Feb. 28, 1966, eff. July 1, 1966.

Fed. R. Civ. P. 20—*Permissive Joinder of Parties.*

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Omitted—is not relevant.

Fed. R. Civ. P. 23—*Class Actions.*

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the

class (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include the describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.
As amended Feb. 28, 1966, eff. July 1, 1966.

F. R. C. P. 24—*Intervention.*

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Question Presented for Review

The question presented for review in this matter is whether a diversity action brought under 28 U. S. C. A. 1332 (a) will be allowed to proceed as a class action under Fed. R. Civ. P. 23 (b)(3) when the named plaintiffs meet the jurisdictional amount requirement of 28 U. S. C. A. 1332 (a) but some other unnamed plaintiffs of the class do not.

Statement of the Case

This appeal seeks to review the September 7, 1972, affirmation by the United States Court of Appeals for the Second Circuit of a Decision of the United States District Court of the District of Vermont, dated September 30, 1971, wherein the District Court denied permission for this case to proceed as a class action under Fed. R. Civ. P. 23 (b)(3).

This is a diversity action seeking compensation and punitive damages for harm to the plaintiff's lakefront properties caused by the defendant International Paper Company's alleged pollution of Lake Champlain. The action was filed in the United States District Court for the District of Vermont on February 9, 1971, by the named plaintiffs on behalf of themselves individually and on behalf of all other plaintiffs similarly situated. The basis for jurisdiction in the first instance was 28 U. S. C. A. 1332 (a). The District Court dismissed this case for lack of jurisdiction as to all members of the class except the named plaintiffs, and then permitted an interlocutory appeal under 28 U. S. C. A. 1292 (b).

The Complaint alleged that discharges into Ticonderoga Bay in southern Lake Champlain from defendant's pulp and paper manufacturing plant in Ticonderoga, New York, had caused the formation of a "sludge blanket or bed" of woodchips, cinders, and other decaying organic waste material, had adversely affected the water quality of the lake, and had resulted in deposits of portions of the sludge on Vermont lakefront properties across from the plant. The named plaintiffs sued on behalf of a class of some 200 lakefront landowners and lessees in a three-town geographic area, claiming that the value of their properties has been diminished as a result of discharges from the plant, and seeking compensatory and punitive damages. The Complaint alleges that the named plaintiffs have each suffered damages in excess of $10,000.00, but makes no allegations as to the damages of the unnamed members of the purported class.

This is essentially the same set of facts which produced a suit of which this Court took original jurisdiction during the October Term, 1970, *State of Vermont v. State of New York and International Paper Company.* That case is presently being tried before a master.

The District Court held "with great reluctance" (Petition for Writ of Certiorari, Appendix, p. 46) that this suit could not be maintained as a class action under Fed. R. Civ. P. 23 (b)(3), reading *Snyder v. Harris*, 394 U. S. 332 (1969), to require that:

> "each class member in a spurious class action must independently satisfy the requirement as to jurisdictional amount." (Petition for Writ of Certiorari, Appendix, p. 44).

Judge Leddy found that in this case:

> "it is unlikely that the property of every lakefront landowner in the towns of Orwell, Shoreham, and Bridport is valued at $10,000.00, and, to a legal certainty, it is not credible that every such owner has suffered pollution damage in excess of $10,000." (Petition for Writ of Certiorari, Appendix, p. 42).

He observed that:

> "the requirement that each class member meet the jurisdictional amount clearly undermines the usefulness of Rule 23 (b)(3) class suits, because the problem of defining an appropriate class over which the court has jurisdiction will often prove insuperable." (Petition for Writ of Certiorari, Appendix, p. 46).

Nevertheless, Judge Leddy felt compelled to order that the action not be permitted to proceed as a class action.

The United States Court of Appeals for the Second Circuit, by a 2 to 1 vote, affirmed on September 7, 1972. In dissent, Judge Timbers argued that ancillary jurisdiction should operate to allow class treatment of this suit. He wrote:

> "The majority's reliance on *Snyder v. Harris* . . . strikes me as being unsupportable. In *Snyder* no member of the class had a claim that could satisfy the amount in controversy requirement; so that the Court never reached the ancillary jurisdiction issue." (Petition for Writ of Certiorari, Appendix, p. 27).

Unlike *Snyder*, Judge Timbers argued, this case is properly within federal jurisdiction with regard to the named plaintiffs, and ancillary jurisdiction should extend to the unnamed plaintiffs.

The majority opinion did not directly treat the question whether ancillary jurisdiction exists as to the unnamed plaintiffs in this case. Accordingly, on September 18, 1972, plaintiffs filed a petition for a rehearing containing a suggestion that the appeal be reheard *en banc*. Of the eight active Second Circuit judges, one disqualified himself. Of the seven remaining judges, four voted in favor of *en banc* reconsideration, and three opposed reconsideration. The petition was nevertheless denied, because Fed. R. App. P. 35 (a) authorizes a rehearing *en banc* only when ordered by a "majority of the circuit judges who are in regular active service", apparently requiring a 5-2 vote in order for this appeal to be reconsidered. Judge Timbers, joined by Judge Oakes, dissented from this application of the rule.

A Petition for a Writ of Certiorari was filed with the United States Supreme Court on December 16, 1972. The Petition for Certiorari was granted on February 20, 1973.

Summary of Argument.

Application of the doctrine of ancillary jurisdiction to a Rule 23 (b)(3) class action where the named parties meet the requisite jurisdictional amount but some unnamed members of the class do not is consistent with the doctrine of *Snyder v. Harris*. It is also consistent with the cases supporting *Snyder v. Harris* and the policy considerations of prompting judicial economy. The lower court erred in extending *Snyder v. Harris* to this case. No independent jurisdictional amount should be required of the unnamed class members who are more analogous to intervenors as of right than to parties permissively joined. Application of the doctrine of ancillary jurisdiction will promote proper utilization of Rule 23 (b)(3) class actions as protective devices.

ARGUMENT

The lower court erred when it extended the holding of *Snyder v. Harris*, 394 U. S. 332 (1969), to deny federal court jurisdiction in a class action where the named plaintiffs met the jurisdictional amount but some of the unnamed plaintiffs did not.

POINT I

Application of the doctrine of ancillary jurisdiction to establish federal jurisdiction of the unnamed members of a class in a Rule 23 (b)(3) class action when the named members have established jurisdiction in a federal court is consistent with the purposes of *Snyder v. Harris*.

The dissenting opinion below by Judge Timbers focused on the error in the majority opinion stating:

> "(I)t ignores the well established principle that if the case is properly in a federal court, that court has subject matter jurisdiction over the case or controversy in its entirety and, therefore, can adjudicate related claims of ancillary parties who have no independent jurisdictional grounds." (Petition for Writ of Certiorari, Appendix, p. 22).

It is the Rule of this court that once federal jurisdiction has been properly invoked by the named parties to a suit, related claims of additional parties may also be brought before the federal court even though the additional parties lack diversity of citizenship. *Stewart v. Dunham*, 115 U. S. 61 (1885); *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356 (1921). If lack of diversity between the unnamed members of a class and a defendant will not destroy federal jurisdiction, the same principle should apply where the unnamed plaintiffs do not possess the jurisdictional amount. The analogy is complete and the principle should be extended and expanded accordingly.

In fact, as Judge Timbers indicated, the doctrine of ancillary jurisdiction has been expanded by this court from its original use only in situations where it was "necessary to the effective operation of the federal courts", to a concept which "has been used primarily to promote judicial economy through the avoidance of piecemeal litigation". Dissenting Opinion of Judge Timbers, citing *Moore v. New York Cotton Exchange*, 270 U. S. 593 (1926). (Petition for Writ of Certiorari, Appendix, p. 22). In recognition of this expansion, the recent trend in the decisions of the lower federal courts has been to invoke ancillary jurisdiction in cases where the requisite jurisdictional amount was lacking. *General Research, Inc. v. American Employers' Inc. Co.*, 289 F. Supp. 735 (W. D. Mich. 1968); *Lucas v. Seagrave Corp.*, 277 F. Supp. 388 (D. Minn. 1967); *Johns-Manville Sales Corp. v. Chicago Title & Trust Co.*, 261 F. Supp. 905 (N. D. Ill. 1966); *Lesch v. Chicago & Eastern Illinois Railroad Co.*, 279 F. Supp. 908 (N. D. Ill. 1968); *Shipley et al. v. Pittsburg and L. E. R. Company*, 70 F. Supp. 870 (W. D. Pa. 1947). These cases support the proposition that utilization of ancillary jurisdiction would "promote judicial economy through an avoidance of piecemeal litigation".

Unquestionably the application of the doctrine of ancillary jurisdiction in this case will promote judicial economy. While the damages of some members of the proposed class may not meet the requisite jurisdictional amount, it is possible and indeed probable that there are many who do possess claims in excess of ten thousand dollars. The named plaintiffs are the owners of substantial amounts of lake frontage on the shores of Lake Champlain, and their actions will proceed to trial and judgment whether this case is treated as a class action or not. If class action

treatment is denied, the unnamed members with claims in excess of ten thousand dollars will be in a position to adopt a wait-and-see attitude. Judgments in favor of the four named plaintiffs in their individual suits would then result in a rush to the door of the federal courthouse by each of the separate claimants to file his individual claim. Denial of class action status in this case would, therefore, result in a multiplicity of suits being brought in the federal courts, thereby defeating the concept that judicial economy should be encouraged through the avoidance of piecemeal litigation. Application of the ancillary jurisdiction doctrine to this case would promote a single lawsuit and would, therefore, be entirely consistent with this court's position in *Snyder v. Harris, supra,* that a procedure should not be adopted which would ". . . add to the burdens of an already overloaded federal court system". 394 U. S. at 341.

POINT II

Snyder v. Harris does not bar the application of the doctrine of ancillary jurisdiction to a class action where the named class members establish the requisite jurisdictional amount but some of the unnamed class members have not, and application of ancillary jurisdiction is proper in such a case.

A. The underlying case support for *Snyder v. Harris*, does not justify the extension of its holding to this case.

Snyder v. Harris, supra, held that the claims of named members of a Rule 23 class action suit could not be aggregated to establish the initial jurisdictional amount required to give the federal courts power to hear the suit. The majority opinion below extended that holding to preclude federal jurisdiction of unnamed class members who lacked the jurisdictional amount even though the named class

members had already satisfied the jurisdictional amount necessary to invoke federal power to hear their suit. The holding below was based upon language in *Snyder* which repeated the statement in four earlier Supreme Court cases involving joinder of claims to the effect that:

> "(W)hen two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount . . ." *Snyder v. Harris*, 394 U. S. 332, 336, citing *Troy Bank v. Whitehead and Company*, 222 U. S. 39, 40 (1911).

Four earlier cases, including *Troy Bank v. Whitehead and Company*, were cited by *Snyder* to support this principle of non-aggregation. They were *Oliver v. Alexander*, 6 Pet. 143 (1832); *Troy Bank v. Whitehead and Company*, 222 U. S. 39 (1911); *Pinel v. Pinel*, 240 U. S. 594 (1916); *Clark v. Paul Gray, Inc.*, 306 U. S. 583 (1939). A review of these four decisions fails to reveal any well-reasoned analysis indicating that extension of the non-aggregation rule is required by any constitutional provisions or acts of Congress so as to preclude the application of ancillary jurisdiction to invoke jurisdiction in this case.

Oliver v. Alexander, supra, involved an appeal to the Supreme Court brought by an assignee of the assets of a ship owner challenging the separate district court decrees resulting from the claims of seamen against the assets of the ship owner for wages. None of the separate awards exceeded nine hundred dollars, and, thus, the court dismissed the appeals since appellate jurisdiction in the Supreme Court then required a claim where the amount in controversy exceeded two thousand dollars. The court refused to aggregate the claims to establish the requisite amount. It based its decision against aggregation on the separate and distinct nature of the seamen's claims as evi-

denced by separate and distinct decrees in each individual case, noting, that on appeal, each claim would have to be analyzed,

> ". . . as a several and distinct contract with each seaman. Each is to stand or fall by the merits of his own claim and is unaffected by those of his co-libelants. The defense which is good against one seaman may be wholly inapplicable to the other. One may have been paid; another may not have performed a service; and another may have forfeited, in whole or in part, his claim to wages." *Oliver v. Alexander*, 6 Pet. 143, 146.

The court then dismissed the appeals stating:

> ". . . the present appeal must be dismissed; *no one* of the decrees in the circuit court involving a matter in dispute sufficient in value to justify the exercise of the appellate authority of this court." *Oliver v. Alexander*, 6 Pet. 143, 150 (Emphasis added).

No mention was made of the situation presented in this case or what the rule should be in a case where one of the claims met the jurisdictional amount.

It is interesting to note, that this case was tried before the Supreme Court in two parts. The initial segment of the case was reported as *Sheppard v. Taylor*, 5 Pet. 675 (1831). There, the court took jurisdiction of the appeal from the case, brought by the seamen jointly under a specialized rule of admiralty law, in order to decide the common question of law involved, namely, whether the funds in the hands of the assignees were liable to the claims of the seamen. Only one of the original libels before the court at that time was in excess of the two thousand dollar jurisdictional amount for appeal. Apparently, the other fifty-seven claims were in general terms and made no reference to a dollar amount. *Oliver v. Alexander*, 6 Pet. 144, 149. The court made no independent inquiry as to the amount

of the other fifty-seven claims, although this court has felt such inquiry to be a duty in cases where there was doubt as to satisfaction of the requisite jurisdictional amount. *Clark v. Paul Gray, Inc., supra.* It proceeded to rule on the common question of law and issued a decree ordering the lower court to submit the individual claims to commissioners and file separate decrees as to each claim based upon the commissioners' findings. Thus, based upon its factual situation, this initial segment of the case is supporting authority for the application of the ancillary jurisdiction doctrine to cases involving common questions of law or fact such as Rule 23 (b) (3) class actions when one, but not all, of the claims has satisfied the jurisdictional amount.

Troy Bank v. Whitehead, supra, never analyzed or ruled upon the problem of aggregation of individual claims, since it found the claim therein presented to be joint rather than separate. The sentence containing the dictum quoted in the *Snyder* opinion, *supra,* reads in its entirety as follows:

> "When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; *but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.*" 222 U. S. 39, 40 (Emphasis added).

This holding is based upon earlier cases dealing with Supreme Court consideration of whether or not the requisite jurisdictional amount for appellate jurisdiction had been met. See cases cited *Troy Bank v. Whitehead,* 222 U. S. 39, at page 40. These cases are basically creditors' rights suits argued together in the district court for purposes of economy. The prerequisite jurisdictional amount

being then smaller in the district court than the amount necessary for appellate jurisdiction in the U. S. Supreme Court, the jurisdictional amount was questioned as a separate issue in the appellate stage. The court's analysis in these cases follows the same pattern as in *Oliver v. Alexander, supra,* noting the separate and distinct nature of each claim and the problems inherent in analyzing the independent proof necessary to establish each separate claim. In none of these separate and distinct issue cases is there any analysis of the effect on jurisdiction where the common questions of law or fact prevail over the individual issues. Based upon the court's emphasis on the separate and distinct issues presented, it would appear that they must have prevailed over any common issues. Therefore, the earlier separate and distinct claim cases forming the basis for *Troy Bank v. Whitehead, supra,* are not appropriate authority for the situation found in class actions under the present Rule 23 (b) (3).

Today, a Rule 23 (b)(3) class action is more similar to a single right or common and undivided interest situation due to its requirement that "questions of law or fact common to members of the class predominate over any questions affecting only individual members . . ." Justice Fortas recognized this in his dissent in *Snyder v. Harris, supra,* noting that the "painstaking demands of Rule 23" require an initial decision by the district court "that the nominally separate and legally several claims of individuals may be so much alike that they can be tried all at once as if there were just *one claim* . . ." *Snyder v. Harris,* 394 U. S. 332, 357 (Emphasis added). Applying this concept, *Troy Bank v. Whitehead and Company, supra,* would support jurisdiction in this case.

Pinel v. Pinel, supra, provided no new independent analysis of the early non-aggregation rule. The holding is based upon the "settled rule" citing the dictum of *Troy Bank v. Whitehead* quoted in the *Snyder* opinion. *Pinel* is particularly inapplicable to this case, since no one plaintiff in *Pinel* had the requisite jurisdictional amount.

Clark v. Paul Gray, Inc., supra, again provides no independent analysis of the non-aggregation rule. It merely refers to the same dictum of *Troy Bank v. Whitehead* as restated in *Pinel v. Pinel* and adopts it without further reasoning. Such an opinion lacking any independent analysis should not be an "insurmountable barrier" to consideration of the evolving concept of ancillary jurisdiction.

As the foregoing analysis indicates, the case support for the majority opinion in *Snyder v. Harris, supra,* does not contain any well-reasoned construction of constitutional provisions or acts of Congress restricting jurisdiction in cases where common questions of law or fact prevail and one or more of the parties has a proper basis for invoking federal jurisdiction.

B. The underlying policy considerations of *Snyder v. Harris*, will not be thwarted by application of the doctrine of ancillary jurisdiction to a Rule 23 (b)(3) class action where the named class members possess the requisite jurisdictional amount.

The major policy consideration underlying the majority opinion in *Snyder v. Harris, supra,* was that a change in the non-aggregation rule would have to be applied to the liberal joinder provisions of Rule 20 and the joinder of claims provision of Rule 18 thus opening a Pandora's box by allowing federal jurisdiction over any claims "of any parties that for any single reason happen to be brought together in a single action". *Snyder v. Harris,* 394 U. S.

332, 340. This does not follow in a case where the representative plaintiffs meet the jurisdictional amount. In *Snyder*, all parties including the representative plaintiffs had minimal claims, each under ten thousand dollars. If those parties had been permitted to aggregate, the result would have been the bringing of a federal court action which could not otherwise have been brought. But as already indicated, this action has been brought and will proceed in federal court in any event, and it will be consistent with the purposes of promoting judicial economy to adjudicate all the claims in one lawsuit.

Nor does it follow that the limited ancillary jurisdiction rule urged by the plaintiffs in this class action must be applied to the joinder provisions of Rules 18 and 20.

In its most recent treatment of a particularized form of ancillary jurisdiction, pendent jurisdiction, this court stated that:

> "Joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of America v. Gibbs*, 383 U. S. 715, 724 (1966).

The court noted that this doctrine had its own built in remedy to prevent the type of abuses feared in *Snyder* by virtue of the discretionary nature of the power of ancillary jurisdiction.

> "That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion not of plaintiff's right." *United Mine Workers v. Gibbs*, 383 U. S. 715, 726.

Rule 23 (b)(3) mandates the application of jurisdictional discretion by requiring that the court find "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy". In making

such a finding the court must consider "the desirability or undesirability of concentrating the litigation of the claims in the particular forum". The application of the general discretionary principles of ancillary jurisdiction noted in *United Mine Workers v. Gibbs, supra,* coupled with the mandated exercise of discretion in Rule 23 (b)(3) guarantees the federal courts sufficient power to cope with and deny jurisdiction over claims "of any parties that for any reason happen to be brought together in a single action".

Since this court's decision in *United Mine Workers v. Gibbs, supra,* the lower federal courts have applied the ancillary jurisdiction concept to exercise jurisdiction over parties having claims which do not meet the jurisdictional amount requirement where one or more of the plaintiffs having claims stemming from a common nucleus of law or fact do satisfy the requirement. For example, in *Hatridge v. Aetna Casualty and Surety Company,* 415 F. 2d 809 (C. A. 8th, 1969) the court allowed the plaintiff wife to append a claim of less than the jurisdictional minimum for loss of consortium to her husband's claim for personal injuries. In so doing, the court referred to the leading role taken by the Third Circuit in the application of the ancillary and pendent jurisdiction concepts, and said,

> ". . . we find ourselves in sympathy with the 3rd Circuit approach for appropriate cases. It makes good sense; it avoids forum shopping and multiple actions, it tends to reduce costs for litigants; and it avoids the waste of already heavily burdened judicial time . . ." *Hatridge v. Aetna Casualty and Surety Company,* 415 F. 2d 809, 817.

In *Johns-Manville Sales Corp. v. Chicago Title & Trust Co.,* 261 F. Supp. 905 (D. C. Ill. 1966) the court upheld the joinder of a co-plaintiff asserting a claim for less than the jurisdictional minimum. It said,

"Neither the federal jurisdictional statutes nor the prohibition against aggregating of amounts claimed is vitiated by permitting a properly joined co-plaintiff to remain in federal court. Jurisdiction in such situations does not come from the joinder rules but rather, as in the theory of ancillary jurisdiction cases, from the fact that a plaintiff is without the necessity of joinder, properly before the court. The jurisdictional requirements having been met by one plaintiff, those properly joined should be permitted to litigate their claims in the same action." *Johns-Manville Sales Corp. v. Chicago Title & Trust Co.* 261 F. Supp. 905, 907.

See also *General Research, Inc. v. American Employers' Ins. Co.*, 289 F. Supp. 735 (D. C. Mich., 1968); (Claims for more than the jurisdictional amount asserted against four insurers, with ancillary jurisdiction assumed over three additional defendants); *Lucas v. Seagrave Corp.*, 277 F. Supp. 388 (D. C. Minn., 1967) (Plaintiff asserting claim for less than jurisdictional amount); *F. C. Stiles Contracting Co. v. Home Insurance Co.*, 431 F. 2d 917 (C. A. 6th, 1970) (Claim against insurer for $12,000.00, pendent jurisdiction assumed over claims of less than the jurisdictional amount against co-insurers); *Jacobson v. Atlantic City Hospital*, 392 F. 2d 149 (C. A. 3d, 1968) (Malpractice action against a hospital and two physicians; the required jurisdictional amount existed as to the physicians, and the court assumed ancillary jurisdiction over the claim against the hospital); *Wilson v. American Chain and Cable Co.*, 364 F. 2d 558 (C. A. 3d, 1966) noted 1967, 16 Cath. U. L. Rev. 336, 66 Mich. L. Rev. 373; *Wiggs v. City of Tullahoma*, 261 F. Supp. 821 (D. C. Tenn., 1966); *Astor Honor, Inc. v. Grosset and Dunlap, Inc.*, 441 F. 2d 627 (C. A. 2d, 1971); *Leathers Best, Inc. v. S. S. Mormaclynx*, 451 F. 2d 800 (C. A. 2d, 1971).

From the foregoing, it is apparent that since *Gibbs* the federal courts have been applying the concept of ancillary

jurisdiction in joinder matters to claims not meeting the jurisdictional amount. In order to continue the present trend of avoiding a multiplicity of litigation through the expansion of the ancillary jurisdiction concept, the application of ancillary jurisdiction on a discretionary basis is equally appropriate in Rule 23 (b)(3) actions, such as the plaintiffs' case here.

POINT III

A Rule 23 (b)(3) class action is analogous to intervention as of right and no independent basis of jurisdiction should be required of the unnamed class members.

The lower court's extension of *Snyder v. Harris, supra,* to preclude jurisdiction in this case was based upon its conviction that the analogy of Rule 23 (b)(3) class actions "to joinder cases remains valid".

However, today the Rule 23 (b)(3) class action is more properly analogous to intervention as of right under Rule 24 (a)(2) of the Federal Rules of Civil Procedure.

Rule 24 (a)(2) provides for the intervention as of right,

> "when the applicant claims an interest relating to the property or transaction which is the subject matter of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties". F. R. Civ. P. 24 (a)(2).

The words "as a practical matter" were added to the rule in 1966. Prior to this amendment, it had been the rule of this court that a person seeking intervention as of right would have to be in a position where he would be legally bound under principles of *res judicata. Sam Fox Publishing Corp. v. U. S.*, 366 U. S. 683 (1961).

Since 1966, all unnamed parties in a Rule 23 (b)(3) class action are bound by the court's judgment unless they specifically request exclusion from the class; the class member, therefore, has been placed in the same position as a pre-1966 intervenor of right under Rule 24 (a)(2); he is bound by the judgment of the court.

Moreover, the class member is in the same position as a post-1966 intervenor as of right under Rule 24 (a)(2). If, as in this case, the class action is not allowed to proceed but a multiplicity of federal actions will be brought in any event by persons possessing the requisite jurisdictional amount, then those claimants would be intervenors as of right under Rule 24 (a)(2) since their ability as a practical matter to protect their interests would be impaired by the case in chief proceeding to judgment. For example, if a claimant with a claim in excess of ten thousand dollars brought his claim in federal court after an adverse decision in the case of the original named parties, it is probable that the court would rely on the doctrine of *stare decisis* as to common issues of law. The possibility of the application of *stare decisis* has been recognized as a sufficient practical impairment of a claimant's interest to justify his being treated as an intervenor of right. *Atlantis Development Corporation v. United States*, 379 F. 2d 818 (C. A. 5, 1967).

Other practical matter impairments would also exist. Many state court judges might be unwilling to rule independently on a question before them that had already been decided by a federal court. Further, the publicity of the trial might have the effect of swaying a jury's opinion on an issue decided in the original action in the federal court by the named parties.

A Rule 23 (b)(3) class member, therefore, is in the same position as an intervenor as of right, whether under the pre or post 1966 version of Rule 24 (a)(2). The jurisdictional principles applicable to him as intervenor should, therefore, likewise apply to him if he is a class member. The great weight of authority is that if a claimant has intervention as of right, no independent basis of jurisdiction over that intervenor is required. *Formulabs, Inc. v. Hartley Pen Co.*, 318 F. 2d 485 (C. A. 9, 1963) Cert. denied, 375 U. S. 945; *Kozak v. Wells*, 278 F. 2d 104 (C. A. 8th, 1960) 84 A. L. R. 2d 1400; *Black v. Texas Empire Association*, 326 F. 2d 603 (C. A. 10th, 1964).

POINT IV

Application of the doctrine of ancillary jurisdiction to this case will promote the proper utilization of Rule 23 (b) (3) class actions.

At the time *Snyder v. Harris, supra,* was decided, the words, "environmental protection" had not acquired the important connotation which they have today.[1] Since that time, however, the concept of environmental protection has rapidly grown. This court has recently adopted a favorable attitude towards expanding federal jurisdiction to aid environmental protection. In *Illinois v. City of Milwaukee,*

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[1] Public interest in this issue, and in particular as it relates to class actions, is illustrated in many ways; one noteworthy item is H. R. 4900 introduced into the House of Representatives by Congressman Alphonso Bell of California; this bill reads:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that for the purpose of determining jurisdiction of a class action suit brought in the federal courts of the United States according to the Federal Rules of Civil Procedure, the aggregate claims for or against the entire class shall be regarded as the amount in controversy."

This bill is presently pending.

406 U. S. 91 (1972) this court declared that the federal courts had power to develop a federal common law to be applied to pollution cases involving navigable or interstate waters. It further broadened the interpretation of "laws" under 28 U. S. C. 1331 to allow jurisdiction over cases involving this federal common law rather than just statute law.

As in this case, it is unfortunate that this positive approach has been hampered by improper extension of dicta in *Snyder*. Such improper application has caused one commentator to state:

> "Decisions in which *Snyder* is applied to thwart the vindication of environmental claims enable the pollutor to avoid the substantial costs of control attendant to litigation by class action. Cognizant of the fact that no individual member of the public can afford the expensive litigation costs, the pollutor is free to proceed upon a course which results in environmental destruction. Since the expensive costs of litigation to the individual will probably far exceed the minimal damages that a successful individual plaintiff can obtain, it is likely that the pollutor plaintiff will be subjected to only infrequent litigation. Unless there is some mechanism for circumventing the *Snyder* decision, its prohibition against aggregation of claims under Revised Rule 23 'may prove one of the most serious obstacles to environmental class actions for damages . . .'" *Strausberg, Class Actions and Jurisdictional Amount: Access to a Federal Forum—A Post Snyder v. Harris Analysis,* 22 American University Law Review 79, 90 (Fall 1972).

As has already been indicated, the application of the doctrine of ancillary jurisdiction to a class action is consistent with the purposes of *Snyder v. Harris, supra.* If ancillary jurisdiction is properly applied to situations as in this case, it will not be necessary to circumvent *Snyder*

v. Harris, supra. It will further the purpose of a class suit by providing a procedure to protect large segments of the public from the wrongdoings of the pollutor, and, promote judicial economy.

Conclusion

The United States Supreme Court should reverse the decision of the Second Circuit Court of Appeals and remand the action to the United States District Court for the District of Vermont under an order giving that court jurisdiction over the unnamed persons in the alleged class.

Respectfully submitted,

LANGROCK AND SPERRY,

By s/ PETER F. LANGROCK,
Attorneys for Petitioners.

Certificate of Service Under Rule 33

SUPREME COURT OF THE UNITED STATES

October Term 1972

No. 72-888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY.

I, Peter F. Langrock, Esq., a member of the firm of Langrock and Sperry, Drawer 351, Middlebury, Vermont, 05753, attorney for the plaintiffs in the above entitled cause and the petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 5th day of April 1973, I served copies of the foregoing Brief on the International Paper Company, by mailing three copies thereof, in a duly addressed envelope with first class postage prepaid, to the attorneys of record for said defendant, Richard E. Nolan, Esq., a member of the firm of Davis, Polk and Wardwell, 1 Chase Manhattan Plaza, New York, New York, 10005, and Henry Black, Esq., a member of the firm of Black and Plante, Municipal Building, White River Junction, Vermont, 05001.

s/ PETER F. LANGROCK,
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Middlebury, Vermont 05753.

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-888

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Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CITY OF NEW YORK AS *AMICUS CURIAE* AND MOTION FOR LEAVE TO FILE THE BRIEF

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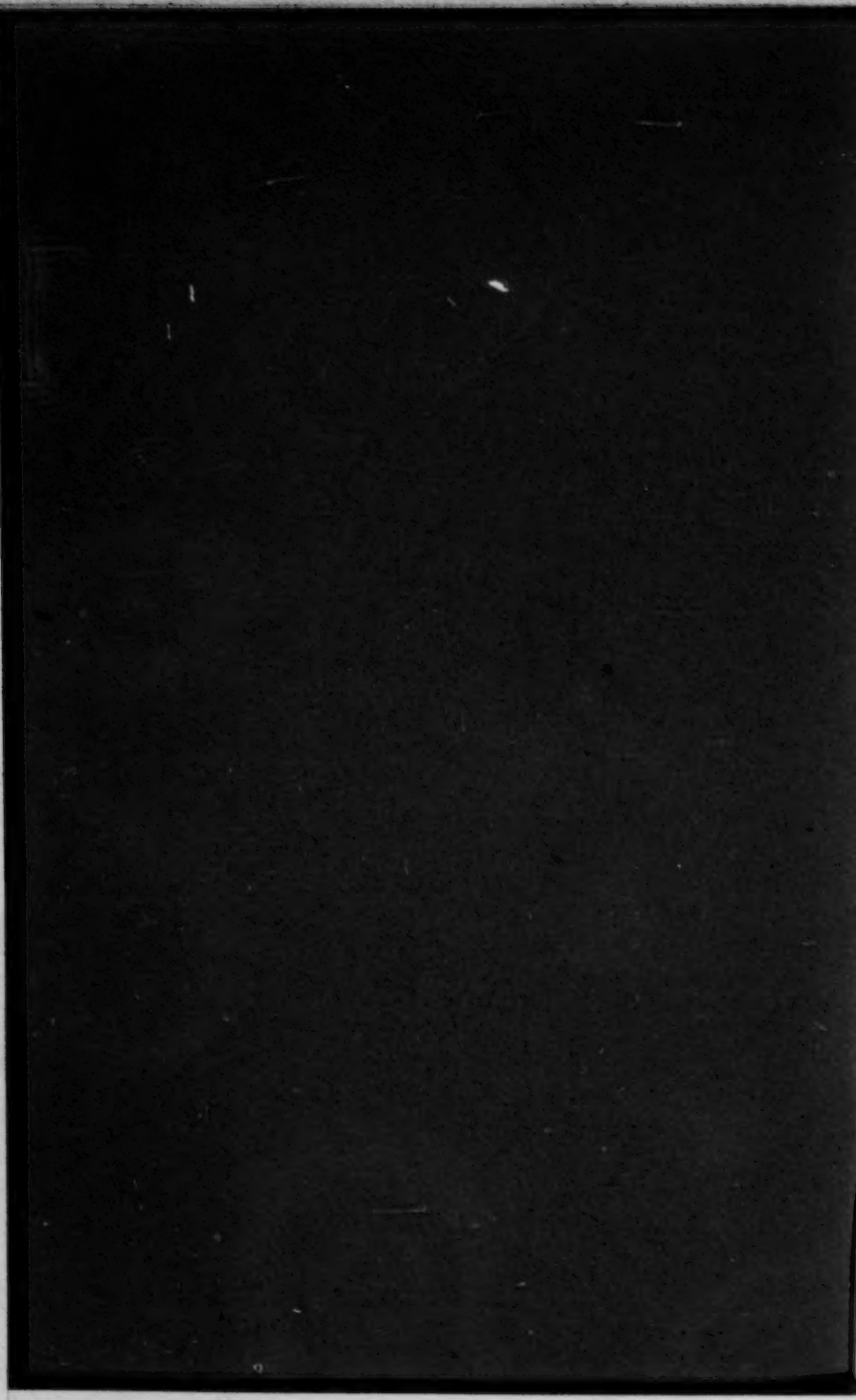

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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Petitioners,

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INTERNATIONAL PAPER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Motion for Leave to File Brief *Amicus Curiae*

The City of New York respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the parties in the case is not needed because the brief is to be presented by the Corporation Counsel of the City of New York who is the authorized law officer of the City of New York, a political subdivision of the State of New York (Supreme Court Rules, Rule 42, subd. 4).

Motion for Leave to File Brief Amicus Curiae

The interest of the City of New York in this case arises from the fact that it is a party defendant in an analogous case presently pending in the United States District Court for the Southern District of New York in which the same issue will have to be decided, *i.e.* whether a diversity action will be allowed to proceed as a class action under Fed. R. Civ. Proc. 23, when the named plaintiffs meet the jurisdictional amount requirements of 28 U. S. C. A. 1332 but some other unnamed members of the class do not.

It is believed that the brief which the City of New York as *amicus curiae* is requesting permission to file will provide factual information which may be of help to the Court in the deliberation upon the issue before the Court.

Dated: May 1, 1973

Respectfully submitted

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

The Interest of the City of New York

The interest of the City of New York in this case arises from the fact that it is a party defendant in an analogous case presently pending in the United States District Court

for the Southern District of New York (Docket No. 71 Civ. 5568, C. L. B., Jr.), brought against the City of New York by Lloyd F. Canfield and Eloise L. Canfield on behalf of themselves and others similarly situated. In the *Canfield* case, the same issue will have to be decided by the District Court, whether a diversity action will be allowed to proceed as a class action under Fed. R. Civ. Proc. 23 when the named plaintiffs meet the jurisdictional requirements of 28 U. S. C. A. 1332, but some other unnamed members of the class do not.

The Argument

The City of New York joins the International Paper Company, respondent herein, in urging affirmance of the lower court decisions.

In so doing, the City relies upon the legal argument of the counsel for the respondent. It submits that the conclusions, and the reasons supporting them, of the late Hon. Bernard J. Leddy, in his opinion and decision reported in 53 F. R. D. 430 (D. Vt., 1971), are sound and logical.

To indicate why the decision of the District Court and the affirmance thereof by the Court of Appeals in the *Zahn* case are sound, we wish to inform this Court of the facts and circumstances the City of New York is now confronted in an analogous case brought against the City as a spurious class action on behalf of "thousands" of owners of land riparian to the Delaware River.

By virtue of the authority and direction given to the City of New York by this Court in the decisions and decrees in *New Jersey* v. *New York*, 283 U. S. 336 (1931) and 347 U. S. 995 (1954), and in compliance therewith, the City of New York has been diverting certain amount of waters from the upper reaches of the Delaware River

in the Catskill Mountains within the State of New York for its water supply for the inhabitants of the City of New York.

The water diversions and the damages alleged to have been caused thereby are the subject matter of the diversity case brought against the City by Lloyd F. Canfield and Eloise L. Canfield, owners of land in Pennsylvania riparian to the Delaware River, on behalf of themselves and of "a class . . . consisting of all other owners of water rights and riparian lands in the States of Pennsylvania, New Jersey and Delaware, downstream on the Delaware River from the Downsville and Cannonsville Dams, who have suffered damages" as a result of interference with the flow of the Delaware River by the City of New York. The complaint alleges that "the individuals in the class number in the thousands." While the claim of the named plaintiffs in the *Canfield* case meets the jurisdictional requirements as to the amount in controversy, it is unlikely that the property of each and every riparian owner on the Delaware River, alleged to be in the "thousands", is valued at $10,000, and, to a legal certainty, it is not credible that every such owner has suffered damages in excess of $10,000.

In the *Canfield* class action, now pending in the United States District Court for the Southern District of New York, the question as to whether or not each class member must independently satisfy the requirement as to the jurisdictional amount has not been raised as yet, and the action is now "dormant" while all of the parties await the outcome of the instant appeal. The outcome of the *Zahn* case will control the future decision of the District Court in the *Canfield* case on the issue of jurisdiction over the members of a class who do not satisfy the monetary requirement.

One of the differences between these two cases is that in the *Zahn* case the class consists of several hundred owners of land on a lake, whereas in the *Canfield* case the alleged class consists of several "thousands" of owners of land on the Delaware River, in three states, on the shores of 500 miles of the river as it winds and turns. In the *Zahn* case, the damages to the property owners are alleged to have been caused by the respondent therein, the International Paper Co., polluting the water of a lake, whereas in the *Canfield* case the damages to the riparian land owners are alleged to have been caused by the defendant, the City of New York, diverting some of the waters of the Delaware River for the purpose of a municipal water supply.

In the event of a reversal in this case, the United States District Court for the Southern District of New York apparently will be vested with jurisdiction over the "thousands" of unnamed owners of riparian or other water rights in areas from Pennsylvania through New Jersey and Delaware to the ocean, regardless of the amount of their individual, separate and distinct claims. Also, in the event of a reversal, the United States District Court for the Southern District of New York would be, for all practical purposes, flooded by "thousands" of separate trials by each of the "thousands" of riparian owners of land on the Delaware River under the legal sanction of a so-called "class action", regardless of the amount of their individual, separate and distinct claims. The trials will require determinations with respect to whether, under the circumstances, there is liability on the part of the City of New York and, in each case, it will be necessary to determine the extent and the amount of damages.

CONCLUSION

The order appealed from should be affirmed in all respects.

May 1, 1973

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAKER and MARION L. LEAKER, individually, on behalf of themselves and on behalf of all similarly situated plaintiffs,

Petitioners,

—v.—

INTERNATIONAL PAPER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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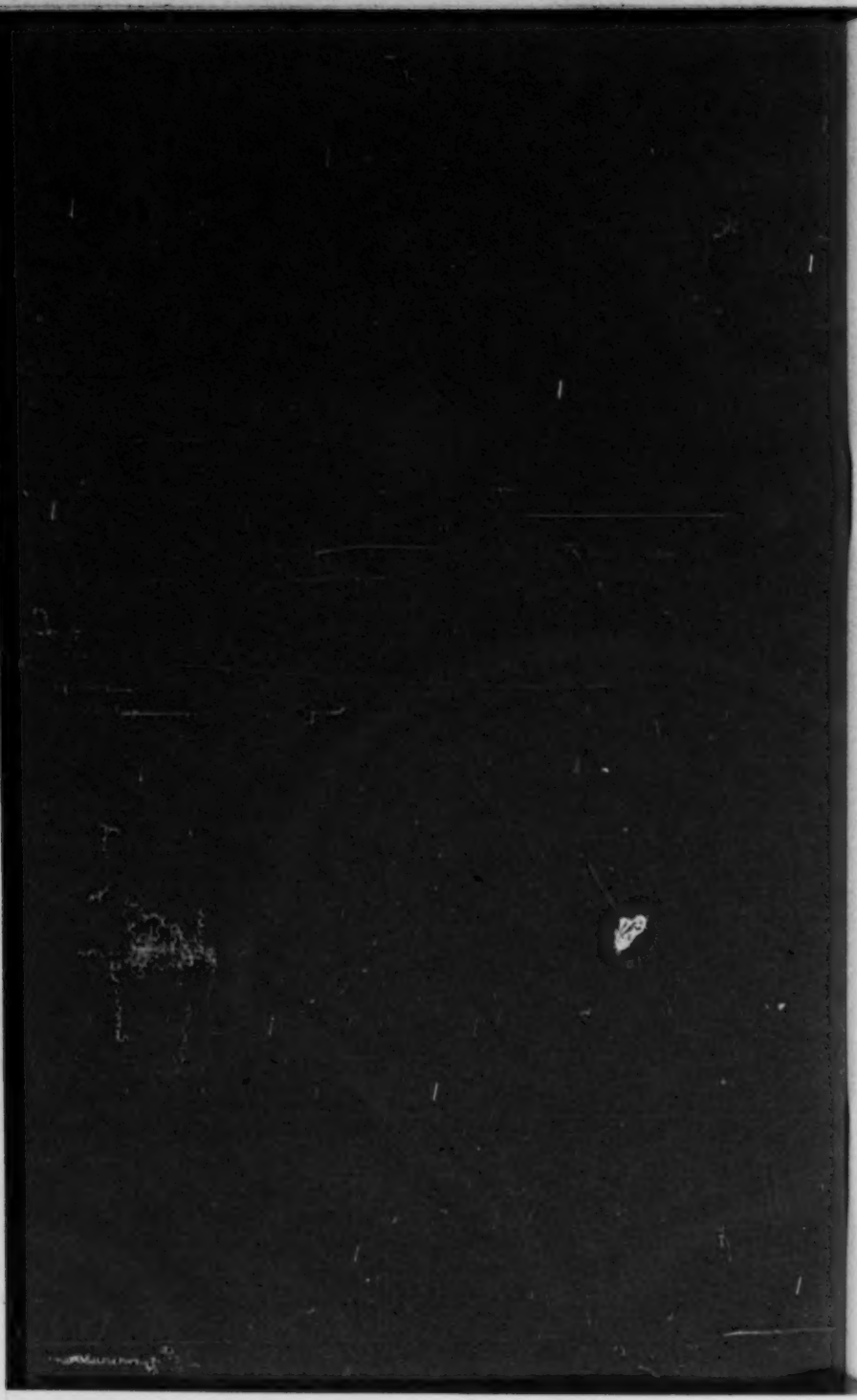

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In the

Supreme Court of the United States

October Term, 1972

No. 72-888

H. Keith Zahn and Valerie Zahn, Charles Leazer and Marion L. Leazer, individually, on behalf of themselves and on behalf of all similarly situated plaintiffs,

Petitioners,

v.

International Paper Company,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the United States District Court for the District of Vermont, which held that this action could not properly proceed as a class action, is reported at 53 F.R.D. 430. The affirming opinion of the United States Court of Appeals for the Second Circuit is reported at 469 F.2d 1033.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit became final on October 18, 1972. A Petition for Writ of Certiorari was filed December 16, 1972, and granted by this Court on February 20, 1973. The jurisdiction of this Court is based on 28 U.S.C. 1254(1).

Constitutional Provision, Statutes and Rules Involved

The relevant constitutional provision is Article III, Section 2, Clause 1, authorizing the establishment by Congress of the diversity jurisdiction of the district courts.

The relevant statutory provisions are 28 U.S.C. 1332(a) granting jurisdiction in diversity cases meeting the requisite "matter in controversy", and 28 U.S.C. 2072 prescribing the power of this Court to promulgate procedural rules.

The relevant Federal Rules of Civil Procedure are Rule 23 (class actions); Rule 24(a) (intervention as of right); and Rule 82 (providing that the Rules shall not extend or limit jurisdiction).

These provisions and rules are set forth in the Appendix to this Brief.

Question Presented

As stated by the Court of Appeals, the question presented is "whether a diversity case will be allowed to proceed as a class action under Fed.R.Civ.P. 23(b)(3) when the named plaintiffs meet the jurisdictional amount requirement of 28 U.S.C. § 1332(a), but the unnamed representatives of the class do not." 469 F.2d at 1033.

Statement of the Case

This action, brought by four named owners of lakefront property on the Vermont side of Lake Champlain on behalf of themselves and some 200 other similarly situated riparian landowners and lessees in a geographic area encompassing the towns of Orwell, Shoreham and Bridport in Addison County, Vermont (JA 7[1]), seeks compensatory and punitive damages for alleged injury to their properties and leaseholds caused by alleged discharges from the operation of Respondent's now-closed pulp and paper manufacturing plant at Ticonderoga, New York (JA 6-14). The action is apparently based on theories of common law trespass and nuisance and seeks to invoke federal jurisdiction on the basis of diversity of citizenship and requisite monetary amount under 28 U.S.C. § 1332(a) (JA 6-7). The complaint alleges that the four named plaintiffs each suffered damages in excess of $10,000 but contains no allegations as to the damages of the unnamed members of the proposed class (JA 7).

The District Court, treating this action as a proposed "'spurious' class action under Rule 23 before its amendment in 1966," held that it could not be so maintained, applying the principle of *Snyder* v. *Harris*, 394 U.S. 332 (1969) "that each class member in a spurious class action must independently satisfy the requirement as to jurisdictional amount." 53 F.R.D. at 431-32.

Judge Leddy found that in this case

> "[I]t is unlikely that the property of every lakefront landowner in the towns of Orwell, Shoreham, and Brid-

[1] References to (JA —) are to the pages of the Joint Appendix.

> port is valued at $10,000, and, to a legal certainty, it is not credible that every such owner has suffered pollution damage in excess of $10,000." 53 F.R.D. at 431.

Under these circumstances, he concluded that the problem of defining a class was "insuperable", that any attempted definition of the class before trial by requiring each member of the class to show the amount of his damages

> ". . . would eliminate any advantage of a class action over joinder" (53 F.R.D. at 431)

and that class action treatment would thus be improper under the Rule 23(b)(3) requirement that it be superior to other methods of adjudication.

Judge Leddy further concluded that definition of the class could not be postponed until after trial on the issue of liability because if liability were found not to exist

> "[T]he res judicata effect of the judgment would depend on an evaluation at some future date of whether a given class member had $10,000 in controversy at the time of this action." 53 F.R.D. at 433.

If, on the other hand, liability were found to exist,

> "[T]he question of jurisdiction would be hopelessly intertwined with the determination of damages". 53 F.R.D. at 433-34.

The Court held that such an *ex post facto* determination of whether a party had been a member of the class would be "an impossible task" and contrary to the purpose of amended Rule 23. 53 F.R.D. at 433.

The District Court's order was affirmed by the Court of Appeals for the Second Circuit on interlocutory appeal,

with one judge dissenting. The Court adopted Judge Leddy's analysis of this case as a proposed "spurious" class action and agreed with his conclusion that every member of plaintiffs' purported class could not conceivably allege damages of the requisite jurisdictional amount. 469 F.2d at 1033 n.1, 1034. While acknowledging that *Snyder* v. *Harris* does not explicitly hold that every unnamed member of the class in a spurious class suit must satisfy the jurisdictional amount, the majority considered that Petitioners' attempt to escape the reach of *Snyder* v. *Harris* by arguing that only some of the plaintiffs need meet the jurisdictional amount requirement—the same argument they make here—was met by "persuasive internal evidence" that this Court did not so limit the rule set forth in *Snyder* v. *Harris*. 469 F.2d at 1034-35.

The Court of Appeals noted that in *Snyder* v. *Harris* this Court "stressed that the aggregation doctrine, grounded in the statutory phrase 'matter in controversy,' far antedated Rule 23". The Court of Appeals observed that this

> "... Court's reliance on *Clark*[2] appears to offer an insurmountable obstacle to appellants, for the *Clark* Court had recognized that one originally named member of the proposed class might meet the jurisdictional amount requirement, just as the named plaintiffs do here; yet the action was dismissed as to all plaintiffs except that one." 469 F.2d at 1035 (footnote reference added).

As the Court of Appeals emphasized, the "point is that in a spurious class action one plaintiff may not ride in on another's coattails." 469 F.2d at 1035.

While recognizing that amended Rule 23 should be given a liberal interpretation in order to vindicate small federal

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[2] *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939).

claims, the Court of Appeals held that the policies underlying that Rule were not determinative of this case. Rather, the fundamental consideration had to be the restricted statutory grant of jurisdiction set forth in 28 U.S.C. § 1332 (a). The purpose of the jurisdictional amount requirement was found to be advanced by denying class action treatment here, for the class action—with approximately 200 separate and distinct property damage claims—would be "enormously time consuming". 469 F.2d at 1036. The Court of Appeals observed that "the Advisory Committee did not intend that Rule 23(b)(3) ordinarily be utilized in a mass tort situation," and further noted that this action was within the category of "local controversies involving claims to be settled on the basis of state law" which, as stated in *Snyder* v. *Harris*, " 'can often be most appropriately tried in state courts.' " 469 F.2d at 1036.

In dissent, Judge Timbers considered that class action treatment should be allowed under a theory of ancillary jurisdiction, reasoning that this result would be consistent with *Snyder* v. *Harris* if that decision were read not "for all it might be worth" but rather "for the least it has to be worth." 469 F.2d at 436. In his view, resort to ancillary jurisdiction would comport with the liberalized joinder practice under the Federal Rules of Civil Procedure. 469 F.2d at 436-38.

Summary of Argument

The diversity jurisdiction of the federal courts does not rest on discretionary considerations, but rather has been specifically limited by Congress to include only those plaintiffs whose claims meet the requisite jurisdictional "matter in controversy." The purpose of this restriction on jurisdiction is to relieve the federal district courts of the burden of adjudicating relatively small claims which can more appropriately be determined in state courts. A "spurious" class action, such as here proposed, is a form of permissive joinder of separate and distinct claims, each of which must independently meet this jurisdictional amount, whether asserted in a spurious class action or otherwise. This is the holding of *Snyder* v. *Harris* and consistent prior decisions of this Court. There is no basis here for departure from these principles.

The suggested use of ancillary jurisdiction to circumvent statutory jurisdictional limitations is improper and would, contrary to clear congressional intent, impose upon the already overburdened federal courts significant additional responsibilities for the resolution of small state claims. To prevent this additional burden and to preserve the necessary balance between state and federal judicial power, the "matter in controversy" requirement, as a jurisdictional limitation, must be strictly construed. Any change such as that advocated by Petitioners cannot be made by this Court, but only by Congress after full consideration of all relevant factors bearing on whether the district courts should be given jurisdiction of this type of case, including the resulting need for additional personnel, facilities and funds to handle increased caseloads.

As a matter of law, resort to ancillary jurisdiction to entertain diversity claims of spurious class members not exceeding $10,000 is impermissible because the spurious class action is a form of permissive joinder to which this doctrine has consistently been held inapplicable.

Ancillary jurisdiction is further inapplicable, again as a matter of law, because it may be exercised only within the confines of a unitary constitutional "case" or "controversy", the outer limits of which are defined by reference to the doctrines of *res judicata* and collateral estoppel. The claims of spurious class members each constitute separate and distinct constitutional "controversies", both by definition and because a purported class member denied participation in a spurious suit will not be bound by a decision adverse to the named plaintiffs.

Even if an exercise of ancillary jurisdiction in the case at Bar would not contravene applicable legal principles and policy considerations, it would nevertheless constitute an abuse of discretion. The separate and distinct claims presented in this case neither stem from a "common nucleus of operative facts" nor comprise an action which would normally be expected to be tried in one proceeding. Any application of ancillary jurisdiction, even assuming power to do so, would constitute a substantial and unnecessary expansion of that doctrine.

ARGUMENT

POINT I

THE COURT OF APPEALS CORRECTLY HELD THAT THE COMPLAINT DOES NOT PROPERLY ALLEGE A CLASS ACTION OF WHICH THE FEDERAL COURTS HAVE JURISDICTION.

A. *Constitutional and Statutory Limitations on Federal Diversity Jurisdiction Require That Each Claimant in a Spurious Class Suit Independently Satisfy the Requisite $10,000 Diversity Jurisdictional Amount.*

The diversity jurisdiction of the federal courts is constitutionally based on Article III, Section 2, Clause 1, which provides that "[t]he judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . ." With respect to this diversity jurisdiction, it is left "to congress to qualify the jurisdiction . . . in such manner as public policy might dictate." *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 334 (1816).

This Court consistently has held that a litigant's access to the district courts is only such as is provided by Congress. *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 234 (1922). Exercising its power to limit the jurisdiction of federal courts over diversity cases, Congress, in first authorizing district courts to hear such suits, fixed the requisite jurisdictional amount in controversy at $500. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78. This jurisdictional amount was raised in 1887 to $2,000 [Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552], in 1911 to $3,000 [Act of March 3, 1911, ch. 2, § 24, 36 Stat. 1091], and in 1958 to its present level of $10,000 [28 U.S.C. § 1332(a)].

This Court has also held that, in view of the constitutional and statutory basis of the "matter in controversy" provision in 28 U.S.C. 1332(a), it must be strictly construed. *E.g., Snyder* v. *Harris*, 394 U.S. 338-40; *Thomson* v. *Gaskill*, 315 U.S. 442, 447 (1942)—"The policy of the statute [conferring diversity jurisdiction upon the district courts] calls for its strict construction"; *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934). One of the main factors behind this policy of strict construction is judicial recognition of the proper balance between state and federal judicial powers. *See Snyder* v. *Harris*, 394 U.S. at 340. As stated in *Healy* v. *Ratta*, 292 U.S. at 269-70:

> "Not only does the language of the statute point to this conclusion, but the policy clearly indicated by the successive acts of Congress regulating the jurisdiction of federal courts supports it . . . . From the beginning suits between citizens of different states, or involving federal questions, could neither be brought in the federal courts nor removed to them, unless the value of the matter in controversy was more than a specified amount. Cases involving lesser amounts have been left to be dealt with exclusively by state courts, except that judgment of the highest court of a state adjudicating a federal right may be reviewed by this Court. Pursuant to this policy the jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount. The policy of the statute calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution . . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to

the precise limits which the statute has defined." (Footnote and citations omitted).

By definition the claims of purported spurious class members are "separate and distinct," as this Court noted in *Snyder* v. *Harris*, 394 U.S. 332, 335 (1969), in categorizing spurious class actions as "merely a form of permissive joinder" of parties with "separate and distinct" claims. 394 U.S. at 335. In dealing with permissive joinder of separate and distinct diversity claims, whether in the form of a spurious class suit or otherwise,[3] this Court has held that each such claim constitutes a "controversy" over which federal jurisdiction can be exercised only insofar as expressly permitted by Article III, Section 2 and 28 U.S.C. § 1332(a). For instance, in *Thomson* v. *Gaskill, supra*, in setting forth standards for use by the district court on remand to determine whether the requisite "matter in controversy" was sufficiently pleaded by plaintiffs, this Court stated:

> "Aggregation of plaintiffs' claim cannot be made merely because the claims are derived from a single instrument, Pinel v. Pinel, 240 U.S. 594 . . . or because the plaintiffs have a community of interest, Clark v. Paul Gray, Inc., 306 U.S. 583 . . . In a diversity litiga-

[3] Professor Moore likewise described the spurious class action as:

> ". . . a permissive joinder device . . . . There was no jural relationship between the members of the class; unlike, for example, the members of an unincorporated association, they had taken no steps to create a legal relationship among themselves. They were not fellow travelers by agreement. The right or liability of each was distinct. The class was formed solely by the presence of a common question of law or fact. When a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in the litigation, which might or might not be accepted." 3 *J. Moore's Federal Practice*, Appendix ¶23.10[1] at pp. 23—2601-02 (2d ed. 1969).

> tion the value of the 'matter in controversy' is measured not by the monetary result of determining the principle involved, but by its pecuniary consequence to those involved in the litigation." 315 U.S. at 447.

Accord, Wheless v. *St. Louis,* 180 U.S. 379 (1901).

Thus, in order for a federal court to exercise its diversity jurisdiction over separate and distinct claims in a manner consistent with Article III, Section 2, and with 28 U.S.C. 1332(a) enacted by Congress pursuant thereto, the claim and underlying "matter in controversy" presented by each claimant must exceed the jurisdictional amount of $10,000.

This principle cannot be vitiated by procedural rules such as amended Rule 23. In granting to this Court the power to prescribe rules for the district courts, Congress specifically provided that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. 2072. This restriction is of course reflected in Rule 82 of the Federal Rules of Civil Procedure, which provides that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts. . . ." The diversity "matter in controversy" requirement is a jurisdictional limitation within the scope of Rule 82 that cannot be modified by procedural rule or judicial decision. *See Mississippi Publishing Corp.* v. *Murphee,* 326 U.S. 438, 445 (1946). This is the underlying thrust of this Court's more recent decision in *Snyder* v. *Harris, supra.*

Because constitutional and statutory limitations on federal diversity jurisdiction require the diversity jurisdictional "matter in controversy" to be independently satisfied by each "separate and distinct" spurious claimant, as discussed *infra* at pp. 13-22, and since the proscriptions of 28 U.S.C. 2072 and Rule 82 have been held to apply spe-

cifically to this "matter in controversy" requirement, the conclusion is compelled that procedural innovations under Rule 23 and the liberalized joinder provisions of the Federal Rules, so heavily relied upon by Petitioners and in the dissenting opinion below, cannot serve as a basis for exercise of federal diversity jurisdiction over spurious class members not alleging damages in excess of $10,000.

B. Snyder v. Harris *and Prior Decisions of This Court Require That in a Diversity Action Each Spurious Class Member Independently Satisfy the Requisite Jurisdictional Amount.*

It was against the backdrop of these fundamental jurisdictional principles that this Court in *Snyder* v. *Harris* held that where, as here, federal jurisdiction over a spurious class suit is sought to be based solely on diversity of citizenship and requisite jurisdictional amount, each plaintiff in the purported spurious class must in good faith be able to allege that he has incurred damages in excess of $10,000 in order to avoid a failure of jurisdiction as to him, because the separate and distinct claims of members of a spurious class cannot be aggregated to satisfy the "matter in controversy" requirement of 28 U.S.C. 1332(a).

In *Snyder* v. *Harris,* it was contended that even if aggregation were not permitted in pre-1966 spurious class actions, the substitution of a functional approach in amended Rule 23 for the former tripartite division of class actions into "true", "hybrid" and "spurious" categories was intended to abrogate the jurisdictional doctrine precluding aggregation in actions which would have been classified as "spurious" under former Rule 23. This Court firmly rejected this contention:

> "[T]he doctrine that separate and distinct claims could not be aggregated was never, and is not now,

> based upon the categories of old Rule 23 or any rule of procedure." (394 U.S. at 336)

and held that these jurisdictional restrictions were compelled directly by "this Court's interpretation of the statutory phrase 'matter in controversy' ". 394 U.S. at 336. This Court further reasoned in *Snyder* v. *Harris* that its prior judicial interpretations of the statutory jurisdictional phrase "matter in controversy" could not, as a matter of law, be negated by changes in Rule 23, because such negation "would clearly conflict with the command of Rule 82 that '[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . .' " 394 U.S. at 337.

In defining the scope of Congress' grant of diversity jurisdiction to the district courts, this Court in *Snyder* v. *Harris* adopted the language of an earlier decision predating original Rule 23 to emphasize the limited scope of this grant:

> "When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of *each* be of the requisite jurisdictional amount . . . " *Troy Bank* v. *G. A. Whitehead & Co.*, 222 U.S. 39, 40 (1911), cited in 394 U.S. at 336 (emphasis added).

The Court also cited another pre-1938 case containing almost identical language:

> "The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of *each* be of the requisite jurisdictional amount . . . " *Pinel* v. *Pinel*, 240 U.S. 594, 596 (1916), cited in 394 U.S. at 336 (emphasis added).

The Court used similar language to describe the doctrine as it continued to exist with respect to spurious class actions after the adoption of Rule 23 in 1938:

> "Under old Rule 23, class actions were divided into three categories which came to be known as 'true,' 'hybrid,' and 'spurious.' True class actions were those in which the rights of the different class members were common and undivided; in such cases aggregation was permitted. Spurious class actions, on the other hand, were in essence merely a form of permissive joinder in which parties with separate and distinct claims were allowed to litigate those claims in a single suit simply because the different claims involved common questions of law or fact. In such cases aggregation was not permitted: *each plaintiff* had to show that his individual claim exceeded the jurisdictional amount." 394 U.S. at 335 (emphasis added).

The application of this rule to class actions with exactly the same force as to joinder is illustrated by *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939), which, in this Court's words in *Snyder* v. *Harris*, applied "this doctrine [prohibiting aggregation] . . . to class actions under the then recently passed Federal Rules." 394 U.S. at 336-37.

> "Proper practice requires that where *each* of several plaintiffs is bound to establish the jurisdictional amount with respect to his own claim, the suit should be dismissed as to those who fail to show that the requisite amount is involved." 306 U.S. at 590, cited in 394 U.S. at 336-37 (emphasis added).

That this principle is fully applicable after 1966 is, of course, the holding of *Snyder* v. *Harris*.

Petitioners' argument that *Snyder* v. *Harris* is not applicable because of the existence in this case of named plain-

tiffs who meet the jurisdictional amount requirement is met, as the Court of Appeals noted, by " . . . persuasive internal evidence that the Court did not so limit the rule enunciated there." 469 F.2d at 1034-35. The Court of Appeals stated:

> "The Court [in *Snyder* v. *Harris*] stated the jurisdictional rule for the former spurious class action, unaltered by the amended Rule 23, to have been that '*each* plaintiff had to show that his individual claim exceeded the jurisdictional amount.' *Id.* at 335 . . . (emphasis supplied)." 469 F.2d at 1035.[4]

In explicitly stating in *Snyder* v. *Harris* that each plaintiff had to meet the jurisdictional amount, this Court cited with approval not only *Clark* v. *Paul Gray, Inc., supra,* but also *Alvarez* v. *Pan American Life Ins. Co.,* 375 F.2d 992 (5th Cir.), *cert. denied,* 389 U.S. 827 (1967), in which a proposed spurious class action was dismissed despite the ability of at least one member of the proposed class to satisfy independently the requisite diversity jurisdictional amount. This is hardly consistent with Petitioners' attempted distinction.

Further support for the proposition that the *Snyder* v. *Harris* decision is dispositive of the case at Bar, despite the fact that the named plaintiffs meet the jurisdictional requirement, is found in the dissenting opinion in *Snyder* v. *Harris,* which unequivocally stated that the rule against maintainability of spurious class suits set forth in the ma-

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[4] Prior to 1966 there could be no plaintiffs except named plaintiffs in a spurious class action because class membership was limited to the original parties and actual intervenors. *See, e.g., All American Airways, Inc.* v. *Elderd,* 209 F.2d 247 (2d Cir. 1954). There is thus no significance to this Court's applying this jurisdictional rule in *Snyder* v. *Harris* with respect to the former spurious class action to "each plaintiff" rather than each spurious class member.

jority opinion would apply "in all cases where one or more of the co-plaintiffs have a claim of less than the jurisdictional amount." 394 U.S. at 343.[8] This recognition that *Snyder* v. *Harris* applied equally to cases where some, but not all, plaintiffs met the jurisdictional amount, illustrates the "persuasive internal evidence" which establishes that the rationale of *Snyder* v. *Harris* was not to be limited to the precise facts of that case, but was applicable, in harmony with prior precedents such as *Troy Bank*, *Pinel* and *Clark*, to all situations of separate and distinct claims in diversity cases.

The principle that plaintiffs who have joined to assert similar but separate and distinct claims must each independently satisfy federal jurisdictional requirements is still further illustrated by prior decisions of this Court interpreting its own appellate jurisdiction when that jurisdiction was limited to review of lower court decisions where the "matter in dispute" exceeded a specified dollar amount. *See, e.g.*, Act of February 16, 1875, ch. 77, § 3, 18 Stat. 316 [$5,000 requirement]. A succession of cases, all decided pursuant to this provision, held that plaintiffs with separate and distinct claims, whether they initiated a joint suit or consolidated their separate suits for purposes of appeal, could not, through aggregation of the "matters in dispute" in their respective claims, bring themselves within the appellate jurisdiction of this Court: *Stewart* v. *Dunham*, 115 U.S. 61, 64-65 (1885); *Fourth Nat'l Bank* v. *Stout*, 113 U.S. 684, 686 (1885); *Hawley* v. *Fairbanks*, 108 U.S. 543, 548-49 (1883); *Adams* v. *Crittenden*, 106 U.S. 576, 577 (1882); *Farmers' Loan & Trust Co.* v.

[8] *Accord, City of Chicago* v. *General Motors Corp.*, 467 F.2d 1262, 1266 n.11 (7th Cir. 1972); *City of Inglewood* v. *City of Los Angeles*, 451 F.2d 948, 952-54 (9th Cir. 1971); *Dirks* v. *Thompson*, 414 F.2d 453, 456 (1st Cir. 1969).

Waterman, 106 U.S. 265, 270-71 (1882); and *Schwed* v. *Smith*, 106 U.S. 188, 189-90 (1882).*

In three of these cases, *Hawley*, *Waterman* and *Stewart*, this Court was faced with appeals from circuit court decisions in which certain of the joint plaintiffs had claims exceeding the requisite "matter in dispute" of $5,000 and others did not. In each instance this Court held that it had jurisdiction of only that portion of the appeal involving claims exceeding $5,000 and dismissed those portions of the appeal stemming from separate and distinct claims of a lesser amount. This Court's decision in *Stewart*, on appeal from judgments in favor of various appellees against the transferee of an alleged fraudulent transfer, is of particular interest. Only one appellee, Dunham, Buckley & Co., had a judgment in excess of $5,000. After accepting the contention of the other appellees "that, as to them respec-

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* Petitioners seek to support a contrary conclusion by drawing unwarranted implications from this Court's decision in *Sheppard* v. *Taylor*, 30 U.S. (6 Pet.) 675 (1831), a companion case to *Oliver* v. *Alexander*, 31 U.S. (6 Pet.) 143 (1832). Both these cases were decided under a statute limiting this Court's appellate jurisdiction to matters in dispute exceeding two thousand dollars. Petitioners note that in *Sheppard*, an appeal was brought jointly by members of a ship's crew to determine "whether the funds in the hands of the [shipowner's] assignees were liable" to their claims for back wages, and that no independent inquiry was made as to the ability of each seaman to assert a claim of the requisite amount. (Petitioners' Brief at 15-16). This was because, as Petitioners concede, appellants were jointly asserting a common right to a fund of assets, thereby necessitating resolution of the competing claims of the assignees and appellants to this fund. Such an action, if instituted in more recent times as a class action, would be classified as "hybrid". In the instant case, this Court is faced with a "spurious" class action involving separate and distinct claims by no means directed at a specific common fund. As shown by the cases cited above, this Court uniformly has refused to exercise appellate jurisdiction over separate and distinct claims unless each independently met the requisite appellate jurisdictional amount then required by statute.

tively, this court has no jurisdiction of the appeal, for the reason that the decrees in their favor are several, and that the amounts adjudged to be paid to them respectively do not exceed the sum or value of $5,000" (115 U.S. at 64), this Court first held that "the motion to dismiss the appeal as to all the appellees, except Dunham, Buckley & Co., must be granted" and then proceeded to reverse the judgment as to appellee Dunham, Buckley & Co. (115 U.S. at 65-67). This Court thus followed its statutory jurisdictional mandate, of a type virtually identical to the statutory "matter in controversy" jurisdictional mandate applicable here, in the face of rather compelling circumstances. Despite disagreeing with the Circuit Court on the merits of the judgments awarded in favor of all the appellees, this Court permitted all but one of these judgments to stand.

The decisions of this Court are uniform in holding that each separate and distinct claimant, whether in the context of a spurious class suit or otherwise, must independently satisfy jurisdictional amount prerequisites. *Snyder* v. *Harris* is the latest reflection of a substantial body of precedent reflecting an acceptance of congressional policy to impose a monetary limitation on the diversity jurisdiction of the district courts. Contrary to the suggestions in the dissenting opinion below and in Petitioners' Brief, there is no basis for limiting *Snyder* v. *Harris* or the long-standing jurisdictional principles which it reflects.

One of the principal purposes of the statutory jurisdictional amount requirement is to keep small claims out of the federal courts, except where some special federal legislation affords a basis for jurisdiction independent of any showing of requisite monetary amount. This purpose is evidenced by not only the $10,000 monetary amount required

under the diversity jurisdiction granted by 28 U.S.C. 1332(a),[7] but also by the inclusion of an identical monetary requirement in the general federal question jurisdiction granted by 28 U.S.C. 1331(a). *See, e.g., Snyder* v. *Harris, supra,* 394 U.S. at 339-40.

Congress set the present "matter in controversy" requirement at $10,000 in both these jurisdictional provisions on the basic premise that "[t]he jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies." S. Rep. No. 1830, 85th Cong., 2d Sess. (1958), reproduced in 2 U.S. Code Cong. & Adm. News 3101 (1958). As this Court stated in *Snyder* v. *Harris,* 394 U.S. at 341-2, "[i]f there is a present need to expand the jurisdiction of [federal] courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts." Any holding by this Court that spurious class members with minor claims may ride the jurisdictional coattails of class representatives will, of necessity, apply to all federal class actions subject to a jurisdictional amount irrespective of their subject matter. Furthermore, as pointed out in *Snyder* v. *Harris,* "[a]ny change in the doctrine of aggregation in class action cases under Rule 23 would inescapably have to be applied as well to the liberal joinder provisions of Rule 20 and to the joinder of claims provisions of Rule 18" and to practically any case in which "claims of any parties . . . for any reason happen to be brought together in a single action." 394 U.S. at 340. If any change in existing jurisdictional re-

[7] The case at bar involves state law damage claims, apparently sounding in nuisance and/or trespass, and not questions of "the purity of interstate waterways" which this Court, in *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 98 (1972), a *parens patriae* suit, held governed by federal common law.

quirements is to be made to meet any claimed special needs —whether in the environmental field or elsewhere—it is for Congress, rather than this Court, to do so, because only Congress is in a position to evaluate the desirability of expanding federal jurisdiction to meet such special needs and to solve the practical problems of such an expansion of jurisdiction in terms of providing required additional judicial and other personnel, required additional facilities and required additional funds.[8]

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[8] Congress has evidenced a continuing awareness of the obstacles posed to federal jurisdiction by "matter in controversy" restrictions and has extended or contemplated extension of federal jurisdiction to cover types of claims not previously covered where it has concluded that state regulation was insufficient. For instance, in the field of motor vehicle safety regulation, Congress, in October 1972, enacted the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1901 *et seq.*, which promulgates or authorizes promulgation of various motor vehicle construction standards and creates various federal causes of action, where none existed previously, to recover damages for losses stemming from non-compliance with these standards—*e.g.*, 15 U.S.C. §§ 1918, 1989. A litigant's recourse under these provisions is not conditioned on satisfaction of a jurisdictional amount.

In other fields, such as that of consumer protection, Congress has contemplated and at least temporarily rejected unlimited extension of federal jurisdiction. In October 1972, Congress enacted the Consumer Product Safety Act, 15 U.S.C. §§ 2051 *et seq.*, partially because it found that "control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers." 15 U.S.C. § 2051(a)(4). Aside from setting up an independent Consumer Product Safety Commission to regulate consumer product safety through promulgation and enforcement of appropriate standards, this Act provides, along with criminal and civil penalties, for private damage suits by persons injured by reason of knowing or willful violation of these standards. 15 U.S.C. § 2072(a). However, in this instance, Congress has seen fit to make such private actions "subject to the provisions of Section 1331 of Title 28 as to the amount in controversy." 15 U.S.C. § 2072(a). Thus, Congress is in favor of retention of jurisdictional amount requirements even in certain areas of regulation in which it deems the federal interest to be paramount.

Indeed, as Petitioners note in their Brief at 24 n.1, there is presently pending before the House of Representatives a bill (H.R. 4900, 93rd Cong., 1st Sess. (1973)) which would permit aggregation of claims in all federal class actions. If there is, as claimed by Petitioners, a compelling public need for the expansion of federal jurisdiction in environmental cases, Congress presumably will respond and provide the federal courts with the necessary funds, facilities and personnel to handle such cases. If Congress does not enact such legislation, then the urgency of the need for expanded federal jurisdiction in these areas will have been overstated. In any event, it is for Congress, not this Court, to determine if a problem exists and, if so, to determine the appropriate solution.

Finally, the case at Bar is a most inappropriate vehicle for any broadened judicial interpretation of jurisdiction in the area of federal class actions. The unnamed members of the proposed class in this case cannot possibly be prejudiced by the decision below because they are at liberty to litigate their various claims in the Vermont state courts[9] and could seek to invoke Vermont's class action statute[10] which is almost identical to amended Rule 23 and is applicable to the Vermont county courts which have jurisdiction of all claims exceeding $200.[11] International Paper Company is amenable to the jurisdiction of the Vermont courts. Thus, there is no basis for any attempted relaxation of long standing jurisdictional requirements in this case.

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[9] Virtually all states now have some form of class action device. *See* G. I. Strausberg, *Class Actions and Jurisdictional Amount: Access to a Federal Forum—a Post* Snyder v. Harris *Analysis*, 22 Am. U. L. Rev. 79, 93 n. 90 (1972).

[10] Vt. Stat. Ann. R. C. P. Rule 23 (1971).

[11] *See* Vt. Stat. Ann. T. 4 §§ 113, 437 (1971-72).

POINT II

USE OF ANCILLARY OR PENDENT JURISDICTION TO ENTERTAIN THE SEPARATE AND DISTINCT CLAIMS OF SPURIOUS CLASS MEMBERS WHO FAIL TO MEET THE REQUISITE DIVERSITY JURISDICTIONAL AMOUNT WOULD CONTRAVENE CONTROLLING CONSTITUTIONAL, STATUTORY AND DECISIONAL PRINCIPLES AS WELL AS APPLICABLE POLICY CONSIDERATIONS.

A. *Resort to Ancillary Jurisdiction to Entertain Diversity Claims of Spurious Class Members Not Exceeding $10,000 Is Impermissible Because the Spurious Class Action Is a Form of Permissive Joinder to Which This Doctrine Has Consistently Been Held Inapplicable.*

In an obvious effort to circumvent the statutory "matter in controversy" requirement, Petitioners resort to a theory of ancillary jurisdiction to permit, by indirection, the adjudication of claims which are not within the statutory jurisdiction of the district court. This is clearly improper because this case, though brought as a proposed spurious class action, is indistinguishable from the situation of permissive joinder of separate and distinct claims, as to which ancillary jurisdiction has long been held to be inapplicable.

Fundamental to this Court's decision in *Snyder* v. *Harris* was its treatment of "spurious" class actions as "merely a form of permissive joinder" thus requiring "each plaintiff . . . to show that his individual claim exceeded the jurisdictional amount." 394 U.S. at 335. Because the spurious class action is simply one form of permissive joinder called into operation solely by the presence

of common questions of law or fact, the courts have enforced far more stringent jurisdictional requirements for this category of class action than for its "true" and "hybrid" counterparts. Indeed, if the class were "true" or "hybrid", other members could intervene as of right under Rule 24(a) without regard to their citizenship, C. Wright, *Federal Courts* § 72 at pp. 271-72 (1963 ed.). In such actions, the rights of class members with respect to the *res* would be affected. Accordingly, the court had to utilize its ancillary jurisdiction to allow such members to participate because the decision of the court with respect to them would be binding. *See Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921) (hybrid);[12] *Stewart* v. *Dunham,* 115 U.S. 61 (1885) (hybrid); *Dickinson* v. *Burnham,* 197 F.2d 973 (2d Cir.), *cert. denied,* 344 U.S. 875 (1952) (hybrid); *Boesenberg* v. *Chicago Title & Trust Co.,* 128 F.2d 245 (7th Cir. 1942) (true).

However, a judgment in a "spurious" class action bound only those persons named as parties and other persons who participated in the judgment by permissively joining under Rule 20 or permissively intervening under Rule 24

[12] Insofar as the *Ben-Hur* and *Stewart* decisions permit intervention without respect to diversity of citizenship in "hybrid" actions, they may no longer be sound law. In *Ben-Hur,* this Court held that a federal district court could enjoin members of what under 1938 would have been categorized as a "hybrid" class from prosecuting suits in state courts which would relitigate questions settled by its previous decision in their class suit. In a subsequent decision, *Toucey* v. *New York Life Ins. Co.,* 314 U.S. 118 (1941), this Court rejected its *Ben-Hur* holding insofar as it authorized a federal court to enjoin a proceeding *in personam* in a state court on grounds of prior adjudication of "hybrid" claims with respect to the same property by a federal court, thereby making unnecessary exercise of ancillary jurisdiction over intervenors in "hybrid" suits on grounds that decisions in such suits would be binding as to them given their inability to assert their rights in a subsequent state action.

(b). Ancillary jurisdiction was not considered to extend to permissive joinder under Rule 20(a) or permissive intervention under Rule 24(b), and parties seeking to intervene in or join a spurious class had to establish independently all jurisdictional requirements, including diversity and requisite monetary amount. *See Fulton Nat'l Bank* v. *Hozier*, 267 U.S. 276 (1925), discussed *infra* at pp. 25-26, 32; C. Wright, *supra*, § 72 (1963 ed.). *See also*, Note, *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 874, 941-42 (1958); Comment, *Diversity Requirements in Multiparty Litigation*, 58 Colum. L. Rev. 548, 559-60 (1958).

Petitioners, in seeking to draw an analogy from this Court's refusal to require complete diversity of citizenship in hybrid actions such as *Stewart* and *Ben-Hur* (Petitioners' Brief at 11), overlook the critical distinction between (1) permissible extension of federal jurisdiction where essential to resolution of a unitary "case" or "controversy" involving disputed title or conflicting claims to a *res*, and (2) the quite different situation of impermissible extension of federal jurisdiction to cover separate and distinct claims (whether in the context of a "spurious" class suit or otherwise) which neither independently satisfy federal jurisdictional prerequisites nor are directed at a particular unitary *res* or *corpus*.

This Court has applied this distinction in holding that where, as in a "spurious" class action, an intervenor's claim is neither directed at or against a particular *res* or *corpus* of assets nor asserted by way of intervention into a federal proceeding in which rights to the *res* or *corpus* are being conclusively adjudicated, the intervenor must independently satisfy federal jurisdictional requisites. For example, in *Fulton Nat'l Bank* v. *Hozier*, 267 U.S. 276 (1925), a Georgia

claimant sought to intervene in a receivership proceeding to assert a claim against assets of the company in receivership on deposit in a Georgia bank. This Court, pointing to the lack of diverse citizenship between the proposed intervenor and the bank and to the fact that the former's claim had no direct relation to the assets being administered by the receivers, held that federal jurisdiction over this claim, ancillary or otherwise, was lacking:

> "The general rule is that when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; *but no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit. Hoffman* v. *McClelland,* 264 U.S. 552, 558 . . . ." 267 U.S. at 280 (emphasis added).

The rule of *Fulton* has been followed by all circuits which have passed on this issue, with the exception of the Tenth. The Second Circuit, in *Hackner* v. *Guaranty Trust Co. of New York,* 117 F.2d 95, 98 (2d Cir.), *cert. denied,* 313 U.S. 559 (1941), held that in a spurious class suit all purported class members must independently satisfy diversity jurisdiction prerequisites, despite the fact that a named plaintiff's claim exceeds the requisite jurisdictional amount. *Accord, Steele* v. *Guaranty Trust Co. of New York,* 164 F.2d 387 (2d Cir. 1947), *cert. denied,* 333 U.S. 843 (1948). The Third, Fifth, Sixth, Ninth and District of Columbia Circuits have reached similar conclusions. *Koster* v. *Turchi,* 173 F.2d 605 (3d Cir. 1949), *aff'g* 79 F. Supp. 268 (E.D. Pa. 1948); *Alvarez* v. *Pan American Life Insurance Co.,* 375 F.2d 992 (5th Cir.), *cert. denied,* 389 U.S. 827 (1967); *Newsom* v. *E. I. DuPont de Nemours & Co.,* 173 F.2d 856

(6th Cir.), *cert. denied*, 338 U.S. 824 (1949); *McGrath* v. *Tadayasu Abo*, 186 F.2d 766 (9th Cir.), *cert. denied* 342 U.S. 832 (1951); *Knowles* v. *War Damage Corp.*, 171 F.2d 15 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 914 (1949). *Contra, Amey* v. *Black*, 234 F.2d 12 (10th Cir.), *cert. granted*, 352 U.S. 888 (1956), *joint motion for dismissal granted*, 355 U.S. 600 (1958).

Most commentators have joined with this weight of judicial authority in rejecting the notion that unnamed members of a spurious class can participate in such an action without independently satisfying diversity jurisdictional requirements. For instance, Professor Wright states:

> "Ancillary jurisdiction does not apply to joinder of parties under Rule 20; no matter how closely related the matters may be, a party whose citizenship is wrong or whose claim is for less than the jurisdictional amount cannot be joined in a suit with a party who satisfies federal jurisdictional requirements." C. Wright, *Federal Courts* § 9 at p. 21 (2d ed. 1970).

See also, H. Kalven & M. Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 704 (1941); Comment, *Diversity Requirements in Multi-Party Litigation*, 58 Colum. L. Rev. 548, 559-60 (1958). Indeed, Professors Hart and Wechsler have questioned whether the Supreme Court, in view of prevailing doctrines of ancillary jurisdiction, would uphold "so bald an enlargement of federal jurisdiction". *The Federal Courts and The Federal System* 937 (1953 ed.). Similarly, in Note, *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 874, 942 (1958), it is stated that:

> "There seems to be little reason to distinguish intervention in spurious class actions from other situations

> of permissive intervention, or to distinguish the spurious class action itself from permissive joinder. The application of the ancillary-jurisdiction concept in spurious class actions seems to undercut those cases which hold that the concept cannot be applied when these other devices are used."

Ancillary jurisdiction is therefore unavailable to provide jurisdiction over separate and distinct claims which do not independently meet statutory jurisdictional requirements. Petitioners point to no decision of this Court which casts doubt on this well settled principle. Rather, in seeking to avoid the rule of *Snyder* v. *Harris* and other decisions requiring each member of a proposed spurious class independently to meet jurisdictional requirements, Petitioners contend that spurious actions are today "more properly analogous to intervention as of right under (amended) Rule 24(a)(2)" than to permissive joinder and argue that proposed class members therefore need not independently meet the requisite jurisdictional amount. (Petitioners' Brief at 22-24).

This contention is incorrect because Rule 24(a)(2) is wholly inapplicable here. The requirement of subsection (2) that "the applicant claims an interest relating to the property or transaction which is the subject matter of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest" is not, contrary to Petitioners' strained assertions, met by the unnamed members of the proposed class. While not contending that these proposed class members would in any way be bound under principles of *res judicata* by a judgment in a suit prosecuted individually by them, Petitioners nevertheless con-

tend that these proposed members will have their ability to protect their respective interests impaired or impeded "as a practical matter." (Petitioners' Brief at 23).

In pursuing this reasoning, Petitioners first suggest that a decision adverse to the named plaintiffs would have "probable" *stare decisis* ramifications in any subsequent suit instituted by a purported class member judicially excluded from the class. But the very nature of claims asserted respectively by "spurious" class members, which are by definition "separate and distinct", rebuts this contention. The District Court described Petitioners' proposed class suit as "a diversity action in which the plaintiffs seek compensatory and punitive damages for impairment of their property rights . . . ." 53 F.R.D. at 430. Hence, the pivotal issue to be resolved in passing on the merits of each proposed class member's claim is whether there has been undue and unlawful interference with and damage to his property rights. Such a determination will necessarily rest, at least in substantial part, on the facts particular to each proposed class member's situation such as the location and use of his property, the length of ownership and numerous other factors peculiar to specific parcels of real estate. *See* pp. 42-43, *infra*. Under such circumstances, the doctrine of *stare decisis* has no application:

> "In view of the fact that stare decisis is concerned with rules of law, a decision depending on the facts is not controlling precedent as to a subsequent determination of the same question on different facts and a different record . . . ." 1B *J. Moore's Federal Practice*, ¶0.402[2] at p. 117 (2d ed. 1965).

Petitioners next contend that "[M]any state court judges might be unwilling to rule independently on a question

before them that had already been decided by a federal court." (Petitioners' Brief at 23). Even assuming the validity of this broad assertion and its relevance to a determination of status to intervene as of right, the fact remains that the respective separate and distinct claims of Petitioners' purported class members pose unique questions for resolution in a particular factual context. Hence, federal resolution of one or more of these claims could not preclude or make unnecessary independent resolution of the remaining claims by a state court.

Finally, Petitioners contend that publicity surrounding trial of their action might adversely sway jury action in subsequent actions brought by the unnamed members of the proposed class. This is sheer speculation, but if this contention is to be given any weight, *voir dire* examination of prospective jurors, and not wholesale and unwarranted expansion of Rule 24(a)(2), is the solution.

We therefore submit that ancillary jurisdiction is inapplicable and cannot be used as a device to circumvent well-settled jurisdictional principles requiring each member of a spurious class to satisfy independently the monetary requirements of 28 U.S.C. 1332(a).

B. ***Any Judicial Application of Ancillary or Pendent Jurisdiction in the Spurious Class Context Would Contravene the Requirement That These Doctrines Be Used Only Within the Confines of a Unitary Constitutional "Case" or "Controversy".***

The term "ancillary jurisdiction" refers to the exercise of personal jurisdiction over additional parties asserting claims or defenses stemming from and within the confines of a constitutional "case" or "controversy" already before

the federal court for disposition. C. Wright, *Federal Courts* § 9 (2d ed. 1970). The purpose of the ancillary jurisdiction doctrine, as developed by this Court, is the preservation of federal jurisdiction over those "cases" and "controversies" embraced by Article III, Section 2, Clause 1, so as to permit the federal courts to adjudicate all essential elements of a "case" or "controversy", including non-federal aspects. *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738, 819-25 (1824). *See Hurn* v. *Oursler*, 289 U.S. 238, 245-46 (1933). Accordingly, ancillary jurisdiction may be exercised only where necessary to preserve federal jurisdiction over the entirety of those "cases" and "controversies" placed by the Constitution and Congress within the subject matter jurisdiction of the federal courts.

The theoretical basis for such exercise of ancillary jurisdiction was set forth by Chief Justice Marshall in the landmark case of *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824). There, this Court, in construing a statute providing that the Bank of the United States could "sue and be sued . . . in any circuit court of the United States" held, first, that this enactment rendered suits to which the Bank was a party "cases . . . arising under . . . the laws of the United States" within Article III's jurisdictional scope and, second, that this jurisdictional mandate could not be strictly confined to the resolution of abstract constitutional questions but necessarily had to be extended to the resolution of subsidiary legal issues "which depend on the general principles of law, not on any act of congress." Were it otherwise

> ". . . almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance

> to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws or treaties of the United States . . . ." 22 U.S. at 819.

The use of ancillary jurisdiction where necessary to fully adjudicate a constitutional "case" or "controversy" properly before the court, given satisfaction of jurisdictional prerequisites by original parties, subsequently was illustrated in the leading case of *Freeman* v. *Howe*, 65 U.S. 450 (1860), in which exercise of jurisdiction over ancillary claimants was premised on the notion that once federal jurisdiction exists to entertain claims of original parties to specific property under court control, the federal court must entertain all ancillary claims to the same property on the theory that:

> "Unless the federal court has ancillary jurisdiction to hear the claims of all persons to the property, regardless of their citizenship, some persons, with a valid claim to the property would be deprived of any forum in which to press the claim." C. Wright, *supra*, § 9 at p. 19 (2d ed. 1970).

This reasoning had been used by this Court not only to justify exercise of ancillary jurisdiction but also to define the proper boundaries of this exercise:

> "[N]o controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit." *Fulton Nat'l Bank* v. *Hozier*, 267 U.S. 276, 280 (1925).

Expanding the scope of permissible use of ancillary jurisdiction within the unitary constitutional "case" or

"controversy" context, this Court, in *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 (1926), held that a federal court could exercise ancillary jurisdiction over compulsory counterclaims, on the theory that once there was federal jurisdiction over a constitutional "case" or "controversy", a federal court had to have the power to entertain on an ancillary basis all other claims, the subsequent litigation of which would be precluded if not raised in the context of the principal suit in the federal forum. Similarly, with the broadening of compulsory joinder of parties and claims under the Federal Rules of Civil Procedure, ancillary jurisdiction has been used to permit the joinder of claims which, if not asserted in the principal action properly before the federal court, would be barred from subsequent litigation.

Even as most broadly construed, however, the exercise of ancillary jurisdiction has consistently been held impermissible as to claims which are not required to be asserted in the principal action, but may be asserted elsewhere at the claimant's option. *See* discussion at pp. 23-28, *supra*. Thus, ancillary jurisdiction permits federal courts to hear compulsory counterclaims under Rule 13(a) and to bring in additional parties to respond to compulsory counterclaims under Rule 13(h), but has no application to permissive counterclaims under Rule 13(b). *Compare, e.g.*, *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 (1926) and *Scott* v. *Fancher*, 369 F.2d 842 (5th Cir. 1966) with *Chance* v. *County Bd. of Trustees*, 332 F.2d 971 (7th Cir. 1964) and *Lesnik* v. *Public Industrials Corp.*, 144 F.2d 968 (2d Cir. 1944). Similarly, some courts have held that an intervenor as of right under Rule 24(a) may resort to ancillary jurisdiction because he must show that he

"claims an interest relating to the property or transaction" before the court and that his preclusion may prevent full vindication and enforcement of his rights in subsequent litigation, but that ancillary jurisdiction does not apply to the permissive intervenor under Rule 24(b). *Compare, e.g., Black* v. *Texas Employers Ins. Ass'n*, 326 F.2d 603 (10th Cir. 1964) and *Formulabs, Inc.* v. *Hartley Pen Co.*, 318 F.2d 485 (9th Cir.), *cert. denied* 375 U.S. 945 (1963) with *Babcock & Wilcox Co.* v. *Parsons Corp.*, 430 F.2d 531 (8th Cir. 1970) and *Olivieri* v. *Adams*, 280 F. Supp. 428 (E.D. Pa. 1968). Finally, under Rule 20, which deals with permissive joinder, as directly analogous to joinder of claimants in a "spurious" class, ancillary jurisdiction has no application, as discussed at pp. 23-28, *supra*.

There is no decision of this or any other court cited by Petitioners or in the dissenting opinion below which provides any precedent for the use of ancillary jurisdiction in a spurious class action. Rather, the use of ancillary jurisdiction has been limited to situations where its exercise was necessary to determine rights to specific property before the court or where, as in the case of compulsory counterclaims, substantial rights might otherwise be lost. An expansion of the hitherto limited doctrine of ancillary jurisdiction to encompass separate and distinct claims would constitute a serious judicial erosion of the settled jurisdictional principles discussed in Point I of this Brief.

Despite Petitioners' contention to the contrary, the related doctrine of pendent jurisdiction is equally inapplicable here. "Pendent jurisdiction", while sometimes categorized as a specialized form of ancillary jurisdiction, refers only

to the exercise of federal jurisdiction over a state law claim pendent to a federal claim, where both claims are asserted by the same party. The case at bar presents only state law claims, thus rendering pendent jurisdiction inapplicable. Furthermore, just as with ancillary jurisdiction, pendent jurisdiction, even where applicable, can be utilized only in the context of a unitary constitutional "case" or "controversy", and not in the context of an action comprised of separate and distinct claims. As this Court stated in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966):

> "Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ,' U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case'."

It is because separate and distinct claims cannot fall within a unitary constitutional "case" or "controversy" (*see* pp. 11-12, *supra*), that it has been similarly stated in *Hurn* v. *Oursler*, 289 U.S. 238, 245-46 (1933), that proper utilization of pendent jurisdiction

> "does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action."

The theory behind exercise of pendent and ancillary jurisdiction is essentially the same—once the federal court properly has jurisdiction over a constitutional "case" or "controversy", it must be permitted to resolve it in its entirety, whether this requires hearing a non-federal claim pendent

to a federal claim or requires, for example, the hearing of ancillary claims directed at property in the control of a federal court, regardless of the citizenship of the ancillary claimants or their ability to independently satisfy the requisite "matter in controversy." C. Wright, *supra*, § 9 at p. 19 (2d ed. 1970). Language in *Gibbs*, relied on by Petitioners, that under the Federal Rules "[j]oinder of claims, parties and remedies is strongly encouraged" (Petitioners' Brief at p. 19) must therefore be read in the light of the basic requirement that the entire action before the Court must comprise but one constitutional "case" or "controversy". It is only when this constitutional prerequisite is fulfilled that the courts may take into account "considerations of judicial economy, convenience and fairness to litigants" in utilizing pendent jurisdiction, which is a "doctrine of discretion." 383 U.S. at 726.

This Court in *Gibbs* noted that the *Hurn* doctrine, even as extended in *Gibbs*, was intended to restrict the application of pendent jurisdiction to those instances where the principal and pendent claims were potentially intertwined by *res judicata* and collateral estoppel considerations so that litigation of the principal claim might well have preclusive effect on subsequent litigation of the pendent claim. 383 U.S. 715, 723-24. It was by reference to these considerations that *Gibbs* defined the outer limits of a unitary constitutional "case" or "controversy". 383 U.S. at 723-24. It is because the state courts are constitutionally bound by the *res judicata* and collateral estoppel aspects of a federal judgment[13] that, in pendent or ancillary claim situations, the lower courts have, in accordance with *Hurn* and *Gibbs*, exercised federal jurisdiction over state claims, where the in-

[13] See 1B *J. Moore's Federal Practice* ¶0.401, p. 17 (2d ed. 1965).

dependent subsequent state court litigation of such claims would be restricted or partially precluded by the potential *res judicata* and collateral estoppel aspects of an adjudication of a related claim properly before the federal court.

In the instant case, the unnamed members of the proposed class will in no way be precluded by *res judicata* or collateral estoppel from complete litigation of their separate claims in a state court, even should the named plaintiffs lose on the merits. Neither *res judicata* nor collateral estoppel may be asserted defensively against a plaintiff who has had no opportunity to litigate his particular claim. *E.g., Hansberry* v. *Lee*, 311 U.S. 32 (1940). *See generally*, 1B *Moore's Federal Practice*, ¶0.411, p. 1252 (2d ed. 1965). Absent *res judicata* or collateral estoppel considerations, the doctrine of pendent or ancillary jurisdiction, even as most expansively construed, can have no application to the claims of purported spurious class members which fail independently to satisfy the requisite diversity jurisdictional amount. No constitutional "case" or "controversy" is here presented within even the most liberal interpretation of *Gibbs*.

Petitioners cite cases (Petitioners' Brief at 20-21) purportedly upholding federal ancillary jurisdiction over separate and distinct claims of proposed spurious class members who fail independently to satisfy the requisite diversity jurisdictional amount. But these cases are, with the possible exception of two district court decisions, all inapposite. The ancillary or pendent claims there presented, together with the "federal" claims properly before the Court, comprised but one constitutional "case" or "controversy" as defined by this Court in its *Hurn* and *Gibbs* decisions to embrace claims which were potentially intertwined by *res judicata* and collateral estoppel considerations.

Several of these cases involved derivative claims arising out of special "privity" relationships (*e.g.*, husband and wife, guardian and child, principal and agent)—not wholly separate and distinct claims as in the case at bar. For instance, in *Hatridge* v. *Aetna Casualty & Surety Co.*, 415 F.2d 809 (8th Cir. 1969), the Court retained jurisdiction over a wife's claim of less than $10,000 for loss of consortium, because it had jurisdiction over her husband's claim arising out of the same accident and because, under applicable Arkansas law, the wife's claim was entirely derivative to and contingent upon the success of her spouse's action. Similarly, in *Wilson* v. *American Chain & Cable Co.*, 364 F.2d 558 (3rd Cir. 1966), the Court retained jurisdiction over a father's own claim for less than $10,000 for his expenses stemming from personal injuries suffered by his minor son, because another claim he asserted as guardian on his son's behalf exceeded $10,000 and because applicable Pennsylvania law rendered the otherwise jurisdictionally deficient claim wholly dependent on the latter claim and required them to be tried together. *Wiggs* v. *City of Tullahoma*, 261 F. Supp. 821 (E.D. Tenn. 1966), applied ancillary jurisdiction to otherwise jurisdictionally deficient claims of three minor daughters suing by their parent as next friend because these claims had been joined with claims of the parent (and two other minor daughters) in excess of $10,000 arising out of the same automobile accident. In *Wiggs*, the Court noted with approval the "familiar rule that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount to be within the jurisdiction of the district court . . . ." 261 F. Supp. at 822.

In *Jacobson* v. *Atlantic City Hospital*, 392 F.2d 149 (3rd Cir. 1968), the Court retained jurisdiction over a claim

against a hospital for less than $10,000 because it was coupled with and derivative to a claim for over $10,000 asserted against a defendant physician who was an agent of the hospital. Similarly, in *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971), it was the principal-agent relationship between co-defendants which justified the Court's exercise of ancillary jurisdiction over a state tort claim against a pier operator which was appended to an admiralty claim against a carrier for breach of contract of carriage. The Court expressly recognized that the liability of the principal-carrier was derivative to that of the pier operator-agent, because the latter had custody of the shipment at the time of the loss. 451 F.2d at 811 n. 13.

The remaining appellate decisions cited by Petitioners likewise involved claims potentially intertwined by collateral estoppel considerations. In *F. C. Stiles Contracting Co.* v. *Home Ins. Co.*, 431 F.2d 917 (6th Cir. 1970), the Court retained jurisdiction over two insurers that, together with a third, against whom a claim of the requisite amount was alleged, jointly insured plaintiff under "three separate but identical" policies. 431 F.2d at 918. Collateral estoppel and *stare decisis* considerations were present because the main underlying legal issue was whether the agent representing all three insurers could orally extend policy coverage. In *Astor-Honor, Inc.* v. *Grosset & Dunlap, Inc.*, 441 F.2d 627 (2d Cir. 1971), the Court retained jurisdiction over an unfair competition claim asserted against one of three defendants alleged to have acted pursuant to an unlawful conspiracy, the other two defendants having also been charged with copyright infringement, a Lanham Act violation. The basic authority for the Court's decision was Section 1338(b) of the Lanham Act, 28 U.S.C. § 1338

(b), which expressly gives the district courts "original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim" under the Lanham Act. The Court took pains to note that a valid Lanham Act claim could probably have been asserted against this third defendant as well and that "precisely the same facts" would either support or defeat the unfair competition claim against him. 441 F.2d at 629-30. Under these circumstances, plaintiff would have been collaterally estopped from making out an unfair competition case against this third defendant in a subsequent state action, had it failed to do so against his two co-defendants in the federal forum.

Some support for Petitioners' contention may be found in *Lucas* v. *Seagrave Corp.*,[14] 277 F. Supp. 338 (D. Minn. 1967) and *Johns-Manville Sales Corp.* v. *Chicago Title & Trust Co.*, 261 F. Supp. 905 (N.D. Ill. 1966). However, these lower court decisions are contrary to the great weight of authority. They focused only on the procedural factors discussed in *Gibbs* and did not consider whether satisfaction of the paramount *Gibbs* prerequisite, the existence of claims comprising but one constitutional "case" or "controversy", had been satisfactorily shown. Indeed, the *Johns-Manville* decision which the Court in *Lucas* found "both persuasive and precisely determinative" (277 F. Supp. at 349), contains no discussion of the underlying facts

[14] In *Lucas*, the Court exercised pendent jurisdiction over the claim of one of several co-plaintiffs, this being the only one of a multitude of claims for under $10,000. The claims involved were all asserted by former employees claiming accrued benefits under a former employer's pension plan. Significantly, the Court refused to reach the question of whether the employees were collectively asserting a "single title or right" to a pension fund, or possessed merely separate and distinct claims. 277 F.Supp. at 348 n.13.

and acknowledges that its exercise of pendent jurisdiction over an otherwise jurisdictionally insufficient claim was "contrary" to "[t]he weight of authority" and based on facts which did not present "a typical ancillary jurisdiction situation." 261 F. Supp. at 906-07.

C. *Application of Ancillary Jurisdiction in This Case Would Constitute an Abuse of Judicial Discretion.*

Assuming *arguendo* that exercise of ancillary jurisdiction in the case at Bar is permissible as a matter of law, such exercise would nonetheless constitute a clear abuse of judicial discretion. As this Court noted in *Gibbs* in the closely related pendent jurisdiction context:

> "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." 383 U.S. at 726.

Ancillary jurisdiction should be even more restrictively exercised than pendent jurisdiction because the former necessitates not only the resolution of additional claims but also the bringing of additional parties before the court with resulting increase in the procedural and substantive complexities to be dealt with by the court. The considerations which have led this Court to apply a doctrine of strict construction to the statutes governing the jurisdiction of the district courts (see pp. 10-11, *supra*) apply with equal if not greater force to proposed expansion of the non-statutory doctrines of ancillary or pendent jurisdiction. *Gibbs* restricts use of pendent jurisdiction, even in the context of a unitary constitutional "case" or "controversy", to pendent claims derived together with principal claims from a "common nucleus of operative fact." 383 U.S. at 725. It has been held that the "common nucleus" requirement is fulfilled

when there is "identity of the facts in the state and federal claims." *Leather's Best, supra,* 451 F.2d at 809. Other decisions indicate that the federal and pendent state claims must arise from the same specific transaction or occurrence. *Wilson, supra,* 364 F.2d at 564. Still others focus on whether "the facts underlying the state and federal claims are identical." *Leather's Best, supra,* 451 F.2d at 811. For present purposes, however, it matters little which of these variations is used. The case at Bar fails to satisfy any one of them.

The critical problems raised by the case at Bar in terms of substantive difficulties and procedural manageability will involve determining (1) the effect, if any, of discharges from Respondents' now closed plant upon individual parcels along approximately 20 miles of Vermont lakeshore and (2) claimed diminution, if any, in the value of each such parcel. The litigation as to each parcel will involve separate inquiry into a number of issues which are critical, not merely to a determination of damages, but to the fundamental issues of defendant's liability for nuisance and/or trespass. These issues include, for example:

(a) the frequency and amount of deposits on each proposed class member's property;

(b) the source of these deposits;

(c) whether these deposits, assuming they have reached a proposed class member's property, have caused him to incur special damages of a type distinct from and an amount greater than those incurred by a somewhat broader segment of the population at large;

(d) whether a given class member is barred by prescription or related doctrines from recovery of damages;

(e) whether a given class member has in fact been precluded from his contemplated use of the waters adjoining his property;

(f) whether, with respect to each proposed class member, the balancing of the equities essential to judicial determination of the existence or absence of a private nuisance, which requires taking into account the underlying public policies of the State of Vermont, justifies his recovery of damages.[15]

The existence of these non-common issues suggests not only the absence of any "common nucleus" within the intent of the *Gibbs* rationale but also the failure of the case at Bar to satisfy the less restrictive requirement of Rule 23 (b)(3) "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members."

The Advisory Committee's Notes to new Rule 23, in discussing subdivision (b) (3), indicate that the requisite commonality of questions of law and fact is generally lacking in a mass tort case:

"A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." 39 F.R.D. at 103.

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[15] Under Vermont law, in balancing these equities, a court must be satisfied that plaintiffs have sustained special damages distinct from and greater than any which have been sustained by the public at large. *Roy* v. *Farr*, 128 Vt. 30, 258 A.2d 799 (1969); *Hazen* v. *Perkins*, 92 Vt. 414, 105 A. 249 (1918).

Class action treatment here, insofar as this case presents a predominance of non-common questions of liability with respect to each proposed class member's claim, would thus be inappropriate. Professors Wright and Miller, who are generally favorably disposed to the class action technique, state:

> "[T]he alleged tortfeasor's defenses may depend on facts peculiar to each plaintiff, creating a risk that they may be submerged by the overall magnitude of the litigation or that individual issues actually may predominate so that a class action really would not be economical or expeditious." 7A C. Wright & A. Miller, *Federal Practice and Procedure*, § 1783 at 115-16 (1972). (Footnotes omitted.)

Professor Moore also recognizes that class action treatment is inappropriate where judicial inquiry, of necessity, must focus on the effect of the defendant's conduct on each claimant:

> "... . [A] class action would probably not be appropriate solely because severable common legal or factual questions exist, unless the remaining half of the cause of action—the legal significance of the common fact situation, or the factual context which gave rise to the legal question—were either negligible or not in controversy.
>
> Thus, if the only facts which would need determination were, for example, the computation of damages, once it is determined that certain activities gave rise to liability, a class action would be suitable. See Brennan v. Midwestern United Life Ins. Co. (ND Ind 1968) 268 F Supp. 702. If, however, once it were established that liability would result from certain conduct, the existence of that conduct would have to be proven separately with regard to each class member, representative treatment would not be appropriate. Caceres

v. International Air Transp. Ass'n (SDNY 1969) 46 FRD 89, 12 FR Serv 2d 23b. 3, Case 14." 3B J. Moore, *Federal Practice* § 23.45 (2) n.56 (2d ed. 1969).[18]

The undesirability of any attempt to apply class action treatment here, even if this were jurisdictionally possible, was noted by the Court of Appeals below:

> "Once appellee's liability had been established, and even assuming that appellee's defenses would not vary as to different members of appellants' class, it would be an enormously time consuming task to assess the damages suffered by each of the 200 riparian landowners, each of whose claims is regarded as separate and distinct." 469 F.2d at 1036.

Thus, any application of ancillary or pendent jurisdiction in this case would be entirely inappropriate. If the unnamed members of the proposed class have any litigable claims, they should bring them, on a class action basis or otherwise, in the state courts of Vermont.

CONCLUSION

Under *Snyder* v. *Harris* and prior precedents of this Court, and in view of the clearly expressed congressional policy of limiting the diversity jurisdiction of the district

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[18] In 1972, the American College of Trial Lawyers, in its *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure*, strongly recommended that Rule 23(b)(3) be expressly amended to provide that:

> "Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members, if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate solely to the calculation of the amount of damage." *Id.* at 1.

courts, each claimant in this case must independently satisfy the statutory "matter in controversy" as a prerequisite to jurisdiction over his claim. There is no basis for departure from this principle or for the application of a theory of ancillary or pendent jurisdiction to achieve by indirection what cannot be done directly. This Court should therefore affirm the order of the Court of Appeals.

Dated: New York, New York
June 13, 1973

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APPENDIX

Texts of Constitutional Provision, Statutes and Rules Involved

Constitution of the United States—
Article III, Section 2, Clause 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Statutes

28 U.S.C. § 1332(a)

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 U.S.C. § 2072

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Federal Rules of Civil Procedure

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are ques-

tions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in

individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe

those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural mat-

ters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 82. Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93.

Certificate of Service Under Rule 33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

WILLIAM H. LEVIT, JR., one of the attorneys for Respondent, International Paper Company, and a member of the Bar of this Court, certifies that on the 13th day of June, 1973 three copies of Brief for Respondent were served on Peter F. Langrock, Esq., Langrock and Sperry, Drawer 351, Middlebury, Vermont 05753, attorney for Petitioners, by depositing the same in a mail box maintained by the United States Postal Service at One Chase Manhattan Plaza, New York, New York 10005, with first class postage prepaid.

June 13, 1973

/s/ WILLIAM H. LEVIT, JR.

WILLIAM H. LEVIT, JR.

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INTERNATIONAL PAPER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF LLOYD F. CANFIELD AND ELOISE L. CANFIELD AS *AMICI CURIAE* AND MOTION FOR LEAVE TO FILE THE BRIEF

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Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF LLOYD F. CANFIELD AND ELOISE L. CANFIELD FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Lloyd F. Canfield and Eloise L. Canfield ("Applicants") respectfully move this Court for leave to file the accompanying brief in this case as *amici curiae* in support of the position of petitioners herein. The consent of the attorneys for the petitioners herein has been obtained but the attorneys for the respondent herein refuse to consent to the filing of a brief by Applicants as *amici curiae*.

Applicants have an interest in this case. They are named plaintiffs in a class action brought on behalf of themselves and all other riparian land owners similarly situated, against the City of New York, now pending in the United

States District Court for the Southern District of New York (Docket No. 71 Civ. 5568). Applicants' action is analogous to the present case and the District Court will have to decide the same question as that presented for decision in the instant case, that is, whether a diversity action under 28 U.S.C. § 1332(a) will be allowed to proceed as a class action under Rule 23(b)(3), Fed.R.Civ.P, when the named plaintiffs meet the jurisdictional amount requirement of 28 U.S.C. § 1332(a) but some other unnamed plaintiffs of the class do not. Unless this Court reverses the decisions below the Canfields' action cannot be maintained as a class action.

On or about May 1, 1973, the City of New York filed a brief in this case as *amicus curiae*, supporting the position of respondent herein (the "City Brief"). The City Brief is devoted exclusively to a discussion of Applicants' pending action against the City and to the argument that the action demonstrates that affirmance of the lower court decisions herein is warranted.

Applicants believe that the brief which they are requesting permission to file as *amici curiae* will refute the City's contentions and will show that the decisions of the courts below must be reversed. Applicants' proposed brief will deal with three major points: (1) the Rule 23(b)(3) action is an essential device for the vindication of small claims which are ancillary to claims that satisfy the jurisdictional amount requirement and, utilized as such device, would minimize the burden on the courts and on the parties; (2) there is machinery available which would relieve the courts from the burden of allocating damages once the common wrong is adjudicated; and (3) if permitted to stand, the

decisions of the lower courts herein would render Rule 23 (b) (3) largely nugatory.

Applicants recognize that, under Rule 42 (2) of the Rules of this Court, the brief of an *Amicus Curiae* must be filed within the time allowed for the filing of the brief of the party supported, and that the time allotted for petitioners' opening brief on the merits has elapsed. However, since Applicants' proposed brief is in the nature of a reply to the City Brief, Applicants respectfully request that their proposed brief be deemed to have been filed within the time allowed by Rule 41 (3) of the Rules of this Court for the filing of reply briefs.

Dated: July 30, 1973.

Respectfully Submitted,

/s/ SEYMOUR GRAUBARD
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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF LLOYD F. CANFIELD AND ELOISE L. CANFIELD AS *AMICI CURIAE*

By leave of this Court, Lloyd F. Canfield and Eloise L. Canfield (the "Canfields") file this brief as *amici curiae.*

Interest of the *Amici Curiae*

The Canfields are named plaintiffs in a class action brought on behalf of themselves and all other riparian land owners similarly situated, against the City of New York, now pending in the United States District Court for the Southern District of New York (Docket No. 71 Civ. 5568) ("Canfield"). They have a further interest in that the City of New York has filed an *amicus curiae* brief herein.

Canfield is analogous to the present case in that the District Court will have to decide the same question as that presented for decision in the instant case, that is, whether a diversity action under 28 U.S.C. § 1332(a) will be allowed to proceed as a class action under Rule 23(b)(3), Fed.R.Civ.P., when the named plaintiffs meet the jurisdictional amount requirement of 28 U.S.C. § 1332(a) but some other unnamed plaintiffs of the class do not. Unless this Court reverses the decisions below *Canfield* cannot be maintained as a class action.

Argument

The Canfields support the position and arguments of petitioners. They also point to three additional considerations: (1) The Rule 23(b)(3) class action is an essential device for the vindication of small claims which are ancillary to claims that satisfy the jurisdictional amount requirement and, utilized as such device, would minimize the burden on the courts and on the parties; (2) there is machinery available which would relieve the courts from the burden of determining damages once the common wrong is adjudicated; (3) if permitted to stand, the decisions of the lower courts herein would, to a large extent, render Rule 23(b)(3) nugatory.

POINT I

The Rule 23(b)(3) Class Action Is An Essential Device For The Vindication Of Small Claims Which Are Ancillary To Claims That Satisfy The Jurisdictional Amount Requirement And, Utilized As Such Device, Would Minimize The Burden On The Courts And The Parties.

That there is need for maintaining the Rule 23(b)(3) class action device as a vehicle for the vindication of common claims, including those of individuals who do not meet the jurisdictional amount requirement of 28 U.S.C. § 1332 (a), has been recognized by Judge Smith, who wrote the majority opinion below. Thus, he wrote:

> "Obviously the only practical way that individual consumers could recover in the circumstances of this case is through the device of class representation, and, as Judge Medina noted, 'the class suit [is designed to] provides (sic) small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.' (citation omitted)." *West Virginia* v. *Chas. Pfizer & Co., Inc.*, 440 F.2d 1079, 1090 (2d Cir. 1971), *aff'd* by an equally divided court, *sub nom. United States* v. *Chas. Pfizer & Co. Inc.*, 404 U.S. 548 (1972). (Per curiam)

Both the instant case and *Canfield* demonstrate that if the application of Rule 23(b)(3) were limited to claims of $10,000 and over, powerful individuals, organizations, or, as is the case in *Canfield*, governmental subdivisions, could deprive persons, who cannot individually shoulder the burden of maintaining independent actions, of recourse to the courts.

The members of the class in *Canfield* own water rights and riparian land located in the States of Pennsylvania, New Jersey and Delaware, downstream (south) on the Delaware River from the Downsville and Cannonsville dams. These dams were constructed by the City of New York ("City") for the purpose of impounding the waters of the Delaware River and diverting those waters to the City's water supply. As a result of these activities by the City the riparian and water rights of each member of the class in *Canfield* have been, and will continue to be interfered with, in that the Delaware River has become dirty, unsightly, unpredictable and unsuitable for those recreational, business and other activities which the members of the class in *Canfield* enjoyed prior to the aforementioned diversion of water by the City.

One of the central issues in *Canfield* arises because of Section K 51-44.0, Chapter 51, Title K, of the City's Administrative Code (the "Section"). Under the Section, the City expressly recognizes that by impounding the waters of the Delaware River and diverting those waters to its use, the City has caused a diminution in the value of riparian land situated on the New York side of the Delaware River and that the owners of such riparian land are entitled to be compensated by the City. The Section also provides for a procedure whereby the extent of the damages caused to property situated on the New York State side of the Delaware River can be determined. But the City has refused and still refuses to extend the same recognition and right of compensation to those persons, like the Canfields, whose land is located outside of the State of New York.

The City's arbitrary and wrongful conduct towards the members of the class in *Canfield* raises serious questions as to the constitutionality of the Section. However, regardless of the issue of constitutionality, the many owners of riparian land along the Delaware should not be put to the needless expense of individually litigating the issue of whether the diversion of the waters of the Delaware by the City constitutes a tortious act for which they should be compensated.

The City's filing of an *amicus curiae* brief here is consistent with its legislative effort to avoid payments to property owners of land on the New Jersey, Delaware and Pennsylvania banks of the River. According to the City, because the members of such class are numerous, each member should be required to bring a separate action. However, the City overlooks the fact that numerosity is the *sine qua non* of a class action under Rule 23, and that the plaintiff classes both in the instant case and in *Canfield* meet all of the prerequisites set forth in subdivisions (a) and (b) (3) of Rule 23, with respect to the maintenance of class actions.

An added factor to be considered is that, with few exceptions not pertinent here, the New York State Courts discourage class actions. Therefore, unless the decisions below are reversed, owners of riparian land situated on the New Jersey, Delaware and Pennsylvania sides of the Delaware River will each have to incur the expense of maintaining a separate action against the City in New York federal or state courts. Moreover, landowners who cannot shoulder the economic burden of maintaining actions on an individual basis will have been deprived of their property without compensation.

Judge Timbers recognized the significance of these considerations in his dissenting opinion below:

> "The position of the majority in this action promotes duplicative litigation—a trial of the representative claims in the federal court and identical actions by the other class members in the state court. Not only does this discourage the named plaintiffs from asserting their right to a federal forum, but it restricts the use of the Rule 23(b)(3) class action to the extraordinary situation in which every member of the class has a claim in excess of $10,000 (unless a statute dispensing with the jurisdictional amount requirement can be invoked). Furthermore, there is no guarantee that a class action could be initiated in the state court. Many states discourage class actions and if the individual claims are so small that suit would have to be instituted in a state court of limited jurisdiction, most likely the class action device would be unavailable." 469 F.2d, at 1039-1040.

POINT II

There Is Machinery Available Which Would Free The Courts From The Burden Of Allocating Damages.

It is proper to avoid the "enormously time consuming task" (469 F.2d, at 1036) of assessing the damages suffered by each member of a large class. However, in expressing this concern the courts below have disregarded their option of first determining liability for all members of the class and then assigning to a special master the tasks of determining membership in the class and assessing damages for individual claimants in accordance with a formula or guideline established by the court. An alternative would be

to try the damage issue only once, making a single award to the class, and then establishing a procedure for the presentation of claims by unnamed members of the class, and dividing the lump sum award among the class members. See Wright & Miller, *Federal Practice and Procedure: Civil* § 1784 (1972).

POINT III

If Permitted To Stand, The Decisions Of The Lower Courts Would, To A Large Extent, Render Rule 23(b)(3) Nugatory.

If permitted to stand, the decisions of the lower courts herein would limit the use of the Rule 23(b)(3), Fed.R. Civ.P., class actions to the extraordinary situations in which the class meets the numerosity requirement of Rule 23(a)(1), Fed.R.Civ.P., and each of its members can demonstrate, *ab initio*, that his recovery will probably exceed the sum of $10,000. This would be the effect even where, as here and in *Canfield*, the jurisdictional amount requirement of 28 U.S.C. § 1332(a) has been satisfied by the named plaintiffs and the controversy is already properly before the federal courts.

It is respectfully submitted that, unless this Court reverses the decisions of the lower courts herein, Rule 23(b)(3) will be largely nugatory and class actions under that Rule, which had been characterized as "spurious" class actions prior to the 1966 amendment thereof, will have been largely extinguished. It is difficult to envision a situation in which a class action under Rule 23(b)(3) would result in the recovery by each member of the class of more than

$10,000, and we are not familiar with any case in which such an award was achieved.

The congressional purpose in imposing, and from time to time increasing, the jurisdictional amount requirement was to check, to some degree, the rising case load of the federal courts. This Court's decision in *Snyder* v. *Harris*, 394 U.S. 332 (1969), is consonant with that purpose. However,

> "Although *Snyder* surely prohibits a [Rule 23] (b) (3) class action in which no member has a claim exceeding the jurisdictional amount, the decision should not be interpreted to limit the class action to the 'extraordinary situation in which every member of the class has a claim in excess of $10,000' (footnote omitted)." *The Supreme Court, 1986 Term*, 83 Harv. L. Rev. 7, 211 (1969).

Adoption of this interpretation of *Snyder* would be consistent with the Congressional purpose underlying 28 U.S.C. § 1332 (a). It can be taken as granted that, where the named plaintiffs satisfy the jurisdictional prerequisites, the caseload will not be diminished by the dismissal of the class action aspect. In such event, it is likely that the named plaintiffs will continue the prosecution of their claims on an individual basis. Whereas in a class action most of the plaintiffs would be inactive participants, this would not be true where each would have to carry the plaintiff's burden himself. Thus, a denial of class action status is bound to result in multiplicity of suits and an increase in burden on both federal and state courts.

CONCLUSION

The United States Supreme Court should reverse the decision of the Second Circuit Court of Appeals and remand the action to the United States District Court for the District of Vermont under an order giving that court jurisdiction over the unnamed persons in the alleged class.

Respectfully submitted,

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MOTION OF CONSUMERS UNION OF UNITED STATES, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME IN SUPPORT OF APPELLANT AND BRIEF OF CONSUMERS UNION OF UNITED STATES, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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MOTION OF CONSUMERS UNION OF UNITED STATES, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME IN SUPPORT OF APPELLANT

Consumers Union of United States, Inc. (hereinafter "Consumers Union") hereby respectfully moves this Court, in accordance with its Rule 42, for leave to file the attached brief amicus curiae in support of appellant in the above-captioned case. The consent of appellant has been obtained and filed with the Clerk of this Court. The consent of respondent was requested but denied.

Consumers Union, a non-profit corporation established in 1936 under the New York Membership Corporations Law, is the largest consumer organization in the world, with more than 375,000 members. Consumers Union publishes the magazine *Consumer Reports*, which has a paid circulation of more than 2.2 million, in which it evaluates consumer goods and services and disseminates information of general consumer interest to its readers. In addition, Consumers Union from time to time participates in judicial and administrative proceedings of concern to consumers. Last term, Consumers Union filed a brief amicus curiae in support of the Government's position in the five drug efficacy cases (*Weinberger v. Hynson, Westcott and Dunning, Inc.* and consolidated cases, Nos. 72-394, 72-414, 72-528, 72-555 and 72-666). Consumers Union has also filed briefs amicus curiae in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973) and *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969).

Since its founding, Consumers Union has devoted considerable attention to the difficulties which consumers face in attempting to redress various types of consumer injuries. Consumers Union regards Rule 23 of the Federal Rules of Civil Procedure, with its provision for class actions, as an efficient and equitable procedural device to assure access to the federal judicial system for claims which, while too small to justify the expenses of individual litigation, are large enough to be consequential. The decision below, if left undisturbed, will substantially defeat the purpose of rule 23 without conferring any corresponding benefit on the federal judicial system.

Consumers Union seeks to file this brief amicus curiae in order to bring to this Court's attention important considerations of policy, including the effects on court

caseloads and the relationship of the federal and state judiciaries, which are at stake in this case and which none of the parties has adequately addressed.

Consumers Union recognizes that this brief amicus curiae is being filed out of time, and respectfully moves this Court to permit its filing for the following reasons. In June, 1973, shortly after this Court had recessed for the summer, the Consumer Federation of America notified Consumers Union, one of its members, that it had filed a brief amicus curiae in support of appellant's petition to this Court for certiorari, but that it could not afford to submit a brief amicus curiae on the merits of the instant case with this Court, as it had intended to do. The lateness of the submission will not prejudice the parties herein because oral argument has not yet been set. Consumers Union also respectfully urges that the late submission will not unduly inconvenience this Court because of its filing during the Court's summer recess.

Because the legal question presented is virtually a matter of first impression and its disposition will be of considerable moment to consumers, Consumers Union submits that the exploration of policy issues in its brief amicus curiae will assist the Court in its task of decision.

CONCLUSION

For the foregoing reasons, Consumers Union respectfully submits that its Motion for Leave to File Brief Amicus Curiae Out of Time in Support of Appellant should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-888

H. KEITH ZAHN AND VALERIE ZAHN, CHARLES LEAZER AND MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF CONSUMERS UNION OF UNITED STATES, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLANT

STATEMENT OF INTEREST OF AMICUS CURIAE

The interest of Consumers Union of United States, Inc., is described in its Motion for Leave to File Brief Amicus Curiae above.

ARGUMENT

ESTABLISHED PRECEDENT AND IMPORTANT CONSIDERATIONS OF PUBLIC POLICY REQUIRE RECOGNITION OF FEDERAL JURISDICTION OVER A CLASS ACTION IN WHICH ALL NAMED PLAINTIFFS SATISFY THE JURISDICTIONAL AMOUNT REQUIREMENT.

Consumers Union, amicus curiae herein, urges this honorable Court to reverse the decision below of the United States Court of Appeals for the Second Circuit, reported at 469 F.2d 1033, which affirmed the order of the United States District Court for the District of Vermont, reported at 53 F.R.D. 430, refusing to permit the action to proceed as a class action. Consumers Union contends that Circuit Judge Timbers' dissent below (Cert. Petn., pp. 22-31) demonstrates that applicable law and policy amply support the use of well-recognized principles of ancillary jurisdiction to allow appellants to proceed as representatives of a class.

Crucial considerations of public policy justify and require reversal of the Second Circuit's decision below. Affirmance would exacerbate, rather than ameliorate, the heavy burdens borne by the nation's courts, federal and state. Named plaintiffs such as those herein would continue to litigate in the federal forum, while all other class members would simply be forced to proceed in state courts, thus needlessly burdening those courts with expensive and duplicative litigation, and jeopardizing the "fair and efficient adjudication" embodied in Rule 23 of the Federal Rules of Civil Procedure.

According to Professor Benjamin Kaplan,[1] a member and, from 1960 to 1966, the Reporter of the Advisory

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[1] Then Professor of Law, Harvard University, now Associate Justice of the Supreme Judicial Court of Massachusetts.

Committee on Civil Rules, the extensive revisions of rule 23 in 1966 sought to make that rule more efficient and rational, in order to promote its dual purposes, namely (1) "to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions," and (2) "to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969). Reversal of the decision below would effectuate both purposes of revised rule 23 – economical use of judicial resources and facilitation of class actions in the federal courts – and is consistent with a well-established line of precedent.[2]

The Zahns and the Leazers, named plaintiffs herein, each alleged claims with values in excess of $10,000. The

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[2] The use of the concept of ancillary jurisdiction to expand the court's reach over an entire case is well-settled. *See, e.g., United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724-25 (1966) (related state claim may be heard with federal claim); *Moore v. New York Cotton Exchange*, 270 U.S. 593, 608-10 (1926) (state claim, asserted as compulsory counterclaim, cognizable in federal courts though federal claim dismissed on merits); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366 (1921) (if named plaintiffs satisfy diversity of citizenship requirements, claims of unnamed plaintiffs of non-diverse citizenship may be finally adjudicated).

Just as the federal courts may, under proper circumstances, assert ancillary jurisdiction over state claims of parties of non-diverse citizenship without violating Rule 82 of the Federal Rules of Civil Procedure, which proscribes construction of the rules to extend federal jurisdiction, so too may the courts assert ancillary jurisdiction over unnamed plaintiffs in a class action who do not satisfy the $10,000 jurisdictional amount requirement of 28 U.S.C. 1332(a).

sole question before this Court is whether named plaintiffs, all of whom are fully entitled to invoke the jurisdiction of a federal court, may at the same time represent a class, some members of which could not themselves invoke such jurisdiction. Accordingly, *Snyder v. Harris*, 394 U.S. 332 (1969), which held merely that a class of plaintiffs, none of whom could individually invoke federal jurisdiction, may not aggregate claims in order to reach the $10,000 jurisdictional amount, is not controlling. Nor is the instant case governed by *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), for the reasons expressed in Part III of Judge Timbers' dissenting opinion below (Cert. Petn., pp. 27-31), and in appellant's brief before this Court (pp. 13-18). Indeed, this is a case of first impression.

This brief will not further discuss the legal precedents herein. They have been presented fully and persuasively by Judge Timbers below and by appellants. Rather, amicus curiae Consumers Union will analyze the critical policy issues involved, for they have received less attention in the presentations to this Court than their importance merits and are of great concern to the members of Consumers Union.

A. The Decision Below, By Refusing to Invoke Ancillary Jurisdiction to Embrace All Class Members' Claims, Fosters Duplicative Litigation without Alleviating the Federal Court Caseload.

Allowing the federal courts to assert jurisdiction over a class whose representatives all allege $10,000 in controversy will neither increase the federal caseload nor overburden the courts. To the contrary, "it makes good sense

in terms of economy and consistency to dispose of . . . additional claims in a single lawsuit," Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 51 (1967). If the *Zahn* class is not allowed to proceed, duplicate litigation will almost certainly result, imposing on the courts and the parties the burdens of multiple expenditures of time and money, with no offsetting benefits. Regardless of whether the class is certified or not, a federal court will undoubtedly decide the substantive issues in *Zahn*. Given that certainty, fostering duplicative litigation can serve no purpose and flatly contradicts the very policy which the court below asserted in justification of its result (Cert. Petn., pp. 20-21), namely, the need to ease the burdens on courts.[3]

The majority below, in assessing the effect of reversal on federal court caseloads, failed to consider the inevitable petitions to this Court for certiorari from state court decisions in cases duplicating federal adjudications at the behest of persons who, but for their lack of $10,000 in controversy, would have been members of a class represented in an existing federal court action. In cases such as *Zahn*, where federal jurisdiction is based upon diversity of citizenship, the plaintiffs refused admittance to the federal action would be strongly motivated to seek legitimate grounds for review in this Court of a state determination. Should federal

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[3] Of course, determination of damages will require a plaintiff-by-plaintiff assessment, but only in those cases in which liability is sustained. Furthermore, the use of such innovative techniques as the appointment of a special master to assist in assessing damages, as was done, for example, in *Biechele v. Norfolk & W. Ry. Co.*, 309 F. Supp. 354, 358-59 (N.D. Ohio 1969), an environmental pollution case like *Zahn*, could streamline this facet of class litigation while retaining the advantages of efficiency which rule 23 was designed to encourage.

and state courts enter different judgments in cases arising out of the same factual or legal relationship, the losing party in the state court will be especially likely to seek review on the basis of any aspect of court procedure – such as selection of jurors or admission of evidence – upon which the two courts disagreed. And potential class members in federal question litigation who have been remitted to the state courts for failure to satisfy the federal jurisdictional amount requirement will have considerable ammunition for appeal if and when state and federal actions by plaintiffs who differ only in the size of their claims result in contrary judgments.

Additionally, this Court should take a broader view of burdens on the national judiciary than did the court below. Reversal of the decision below might marginally increase the work of the federal courts in handling existing cases by requiring the assessment of damages of class members (but only, of course, if liability is found). Affirmance, however, would add numerous new cases to the dockets of the state courts. To swell state court dockets in order to protect the federal courts from such minor burdens would constitute an illogical and inefficient deployment of scarce judicial resources. To save one federal dollar while imposing two or more dollars in costs upon a state court to replay entire adjudications is neither a bargain for the taxpayer nor a method of insuring maximum justice within budgetary constraints. *See* 41 CIN. L. REV. 968, 974 (1972).

Reversal of the decision below would not automatically allow this case and all similar cases to proceed as class actions. The trial court always retains the discretion granted by Rule 23(b)(3) to decide whether or not "a class action is superior to other available methods for the fair

and efficient adjudication of the controversy."[4] One of the relevant inquiries under this rule is whether a class action would in fact economize on expenditures of scarce judicial resources. If no economy would result, the court may deny certification of the class. If judicial economy would be fostered, on the other hand, the court should be allowed to exercise its ancillary jurisdiction over all unnamed plaintiffs, regardless of the value of their claims, where all named plaintiffs have properly invoked federal jurisdiction.

B. Federal-State Comity Requires Exercise of Ancillary Jurisdiction to Reach All Class Members' Claims.

Unless the decision below is reversed to allow exercise of ancillary jurisdiction over all class members' claims, the federal and state courts will experience unnecessary and mischievous conflicts.[5]

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[4] The question of proper exercise of discretion is not before the Court in the instant case. In his order denying certification of the class, Chief Judge Leddy clearly indicated that his opinion was not based on the exercise of discretion ("We reach our decision today with great reluctance," Cert. Petn., p. 46), but on the belief that "*Snyder [Snyder v. Harris, supra]* precludes our obtaining jurisdiction over those members of the proposed class who do not meet the $10,000 jurisdictional requirement" (Cert. Petn., p. 43). *See* 7 GA. L. REV. 390, 399 (1973).

[5] Affirmance, it should be reiterated, would not decrease the number of instances in which federal courts render decisions on matters of state law. Plaintiffs in diversity cases, such as the Zahns and the Leazers, who meet the jurisdictional amount requirement, may proceed individually in the federal courts. The only way to eliminate

(continued)

Two types of unseemly conflicts will inevitably occur unless the decision below is reversed. One potential conflict is substantive disagreement on questions of state law in the context of indistinguishable factual situations if state and federal courts are obliged by the decision below to conduct separate adjudications on matters affecting similarly situated plaintiffs. Such conflicts will appear unjust to the litigants and will confuse the bench, the bar, and the public who rely upon precedent as a guide to decision-making.

Amicus of course recognizes that, in diversity cases, the federal courts must apply state law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). But frequently matters will arise upon which there either has been no definitive state interpretation or state precedent is very old and probably would be modified upon contemporary reconsideration. In such situations, the federal courts apply the law as they think it would be applied by the highest state court; the state courts are free to disagree with federal interpretation and often do.

The second type of potential conflict is more subtle but equally destructive of confidence in the fairness of the judiciary. When two or more[6] courts must rule separately

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[5] (continued)
such conflicts from the judicial system would be to abolish federal diversity jurisdiction.

Note too that federal courts which hear related state claims under their pendent jurisdiction powers are making much more significant inroads on state prerogatives. *United Mine Workers of America v. Gibbs*, *supra*, 383 U.S. at 724-25.

[6] In the instant case and others like it, the unnamed plaintiffs denied participation in federal court may satisfy jurisdiction and venue requirements of more than one state court; several state actions could follow dismissal of the federal class proceeding.

upon issues arising out of one incident, the decision of the first court to rule[7] is likely to exert some influence upon the later rulings. This subtle element in decision making was recently recognized by a federal court in an opinion concerning three class actions which arose out of an airplane collision. An adjudication which goes against a plaintiff, the court noted, is "as a practical matter" dispositive of the rights of others with identical claims who are not parties thereto only because a class proceeding was disallowed. *Petition of Gabel*, 350 F. Supp. 624, 630 (C.D. Cal. 1972).

The two aforementioned conflicts, like Scylla and Charybdis, will be impossible to avoid, unless this Court reverses the decision below. If a state court denies relief that a federal court earlier granted to similarly-situated plaintiffs, there will be conflicting legal precedents and justice will appear erratic. If a state court reaches the same result as an earlier federal case, the parties will rightfully wonder at the extent of the federal influence over the state decision. Neither situation should be tolerated, particularly when no public interest is served thereby.

C. The Decision Below Threatens Continued Viability of Rule 23(b)(3) Class Actions Where Jurisdictional Amount is Required.

Unless this Court reverses the decision below, rule 23 (b)(3) will be limited entirely to those federal question

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[7] The first court to rule is assumed to be the federal court because state court litigation, in cases like the case at bench, would not be initiated until an adverse ruling by the federal court precludes jurisdiction over the class. Sometimes, of course, a later-commenced proceeding might be the first concluded.

cases for which no jurisdictional amount is required. It is simply not credible that the authors of rule 23 intended that section to have such limited applicability.

As Chief Judge Leddy explained (Cert Petn., p. 46), the decision below "clearly undermines the usefulness of Rule 23(b)(3) class suits, because the problem of defining an appropriate class over which the court has jurisdiction will often prove insuperable [footnote omitted]." In few cases will all conceivable class members have claims exceeding $10,000; any class is likely to include at least one potential plaintiff with minimal damages. Insoluble questions arise: at what point does a trial court assume that all unnamed plaintiffs can substantiate their allegations of $10,000 in damages? Need the unnamed class members be identified and asked to present preliminary proof of damages prior to the decision on jurisdiction? The decision below will certainly encourage defendants in all class actions where $10,000 in controversy is a prerequisite to federal jurisdiction to allege that one or more unnamed class members do not satisfy this requirement. Such allegations will become boilerplate in class actions and will confront the trial court with Hobson's choice – either try the issue of damages prior to the trial on liability, or dispense with (b)(3) class actions altogether whenever jurisdictional amount is requisite. The absurdity of either result – and the complete absence of any countervailing benefit in terms of judicial resources from dismissal of such class actions – underlines the necessity of reversal.

THE INSTANT CASE SATISFIES THE JURISDICTIONAL AMOUNT REQUIREMENT BECAUSE DEFENDANT'S STAKE IN ITS OUTCOME IS WORTH MORE THAN $10,000.

This Court should consider the "matter in controversy" requirement from the point of view of the defendant, as well as from that of the plaintiffs. Defendant's stake in the instant litigation is worth significantly more than $10,000, and therefore the jurisdictional amount requirement is satisfied.

This Court has never decided in which of three possible ways the jurisdictional amount requirement should be viewed: in terms of the plaintiff's stake in the outcome of the litigation, in terms of the defendant's stake, or in terms of the stake of either plaintiff or defendant, in the alternative. A minority of courts, taking the latter course, have sustained jurisdiction when the defendant's potential loss exceeded $10,000, although the plaintiff's did not. *See* 1 MOORE'S FEDERAL PRACTICE, Para. 0.91[1]; C. WRIGHT, FEDERAL COURTS, §34 (2d ed. 1970); and cases cited therein. Since all cases affected by the decision below involve, by definition, controversies where significantly more than $10,000 is at stake, this approach to the matter in controversy requirement comports with its rationale, namely to prevent the federal courts from "fritter[ing] away their time in the trial of petty controversies." Wright, *Class Actions*, 47 F.R.D. 169, 183 (1969), citing WRIGHT, FEDERAL COURTS, *supra*, §32. Amicus curiae contends that such a "modified 'defendant-viewpoint' [footnote omitted]," Note, *Taxpayer Suits and the Aggregation of Claims: The Vitiation of Flast by Snyder*, 79 YALE L.J. 1576, 1592 (1970), is appropriate to apply in all class action cases, and would produce results more consistent with the policies

underlying rule 23 than does the conventional "plaintiff-viewpoint." *See generally id.*

FURTHER CONSIDERATIONS PARTICULARLY PERTINENT TO CONSUMER LITIGATION REQUIRE REVERSAL IN THE INSTANT CASE.

But for the class action device, few persons could afford to seek judicial redress of any but the most grievous harm, regardless of the merits of their position. Typically in consumer litigation, a large number of plaintiffs asserts small individual losses caused by the action of a defendant. When there is already a plaintiff "entitled to open the door," Frankel, *supra*, 43 F.R.D. at 51, with a legitimate allegation of a $10,000 claim, the federal courts should exercise the ancillary jurisdiction that they assert in exactly analogous situations (see note 2, *supra*) in order to adjudicate the claims of all members of a class without regard to their size.[8]

It is bitterly ironic that the certification of class actions, which in theory saves time and money for all litigants, is desperately fought by defendants. But it is all too well recognized that, unless the class proceeds, most potential claimants will simply chalk up their losses to experience because they cannot individually afford access to the courts.

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[8] It is inadequate to suggest, as does respondent (Resp. Br., p. 22), that plaintiffs with small claims are adequately protected by state class action procedures. Although most states recognize some type of class action remedy, the procedures are frequently so much more restrictive than those of Federal Rule 23 as to render class remedies nugatory. *See, e.g.*, New York CPLR §1005; *Hall v. Coburn Corporation of America*, 26 N.Y. 2d 396, 311 N.Y.S. 2d 281, 259 N.E. 2d 720 (1970).

Many cities and states are now actively pursuing judicial remedies for harms they suffered as major purchasers of consumer goods. *E.g., In re Antibiotic Antitrust Actions*, 333 F. Supp. 267-324 (1971); Pomerantz, *New Developments in Class Actions – Has Their Death Knell Been Sounded?* 25 BUS. LAWYER, 1259, 1259-60 (1970). Frequently, more than $10,000 is in controversy, as, for example, when a city or county sues to recover money expended for drugs found ineffective by the Food and Drug Administration, but which had nevertheless been purchased for and dispensed at public hospitals for years. *See Consumer Federation of America v. Wyeth Laboratories*, No. 2198-71, *Consumer Federation of America v. Eli Lilly and Company*, No. 304-72, *Consumer Federation of America v. Upjohn Company*, No. 306-72, U.S. District Court for the District of Columbia (decided October 19, 1972), *see* Appendix to Amicus Curiae Brief submitted herein in support of appellant's petition for certiorari by the National Council of Senior Citizens and the Consumer Federation of America. Amicus curiae Consumers Union contends that neither legal precedent nor public policy warrants the refusal of the federal judiciary, having a case legitimately before it brought by plaintiffs who allege $10,000 claims, to adjudicate at the same time citizens' smaller claims for the identical injury.

The decision below has been subjected to a rare unanimity of disapproval by commentators. Indeed, the view of appellant and Consumers Union that this Court should reverse that decision has been supported, generally with enthusiasm, in all the scholarly commentary directed to the *Zahn* opinions.[9] The central conclusion of this large

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[9] *See* G. Strausberg, *Class Actions and Jurisdictional Amount: Access to a Federal Forum – A Post Snyder v. Harris Analysis*, 22 (continued)

body of critics is that the decision below will neither significantly increase nor reduce the federal court caseload, but rather will lead to multiple adjudications, thereby defeating considerations of judicial economy. Note, *Developments in the Law of Federal Class Action Litigation – Catch 22 in Rule 23*, 10 HOUSTON L. REV. 337, 369 (1973); 14 B. C. IND. & COM. L. REV. 543, 553 (1973); 61 GEO. L. J. 1327, 1336 (1973); 9 HOUSTON L. REV. 852, 857-58 (1972); 47 ST. JOHN'S L. REV. 339 (1972). Many commentators have added that, if the decision below is allowed to stand, the usefulness of the rule 23(b)(3) class action as a procedural reform will be almost entirely vitiated. 14 B. C. IND. & COM. L. REV., *supra* at 554; 22 CLEV. STAT. L. REV. 204, 215 (1973); 73 COLUM. L. REV. 359, 370-71 (1973); 61 GEO. L. J., *supra* at 1337; 26 VAND. L. REV. 375, 381 (1973).

In the instant case, the named plaintiffs are entitled to invoke federal jurisdiction regardless of this Court's decision on the certification of the class. "Law is common sense," *Johns-Manville Sales Corp. v. Chicago Title and Trust Co.*, 261 F. Supp. 905, 908 (N.D. Ill. 1966), and common sense, as well as considerations of judicial economy, comity, and avoidance of inequity, demands that all potential claims from defendant's alleged pollution of Lake Champlain be litigated together.

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[9] (continued)
AM. U.L. REV. 79, 98 (1972); *Developments in the Law of Federal Class Action Litigation – Catch 22 in Rule 23*, 10 HOUSTON L. REV. 337, 368-71 (1973); 14 B.C. IND. & COM. L. REV. 543 (1973); 22 CLEV. STAT. L. REV. 204 (1973); 73 COLUM. L. REV. 359 (1973); 41 FORDHAM L. REV. 991 (1973); 7 GA. L. REV. 390, *supra*; 61 GEO. L. J. 1327 (1973); 26 VAND. L. REV. 375 (1973); 9 HOUSTON L. REV. 852 (1972); 47 ST. JOHN'S L. REV. 339 (1972).

CONCLUSION

For the foregoing reasons and those cited by appellant in its brief and by Judge Timbers in his dissenting opinion below, amicus curiae Consumers Union respectfully urges that this Court reverse the decision below.

Respectfully submitted,

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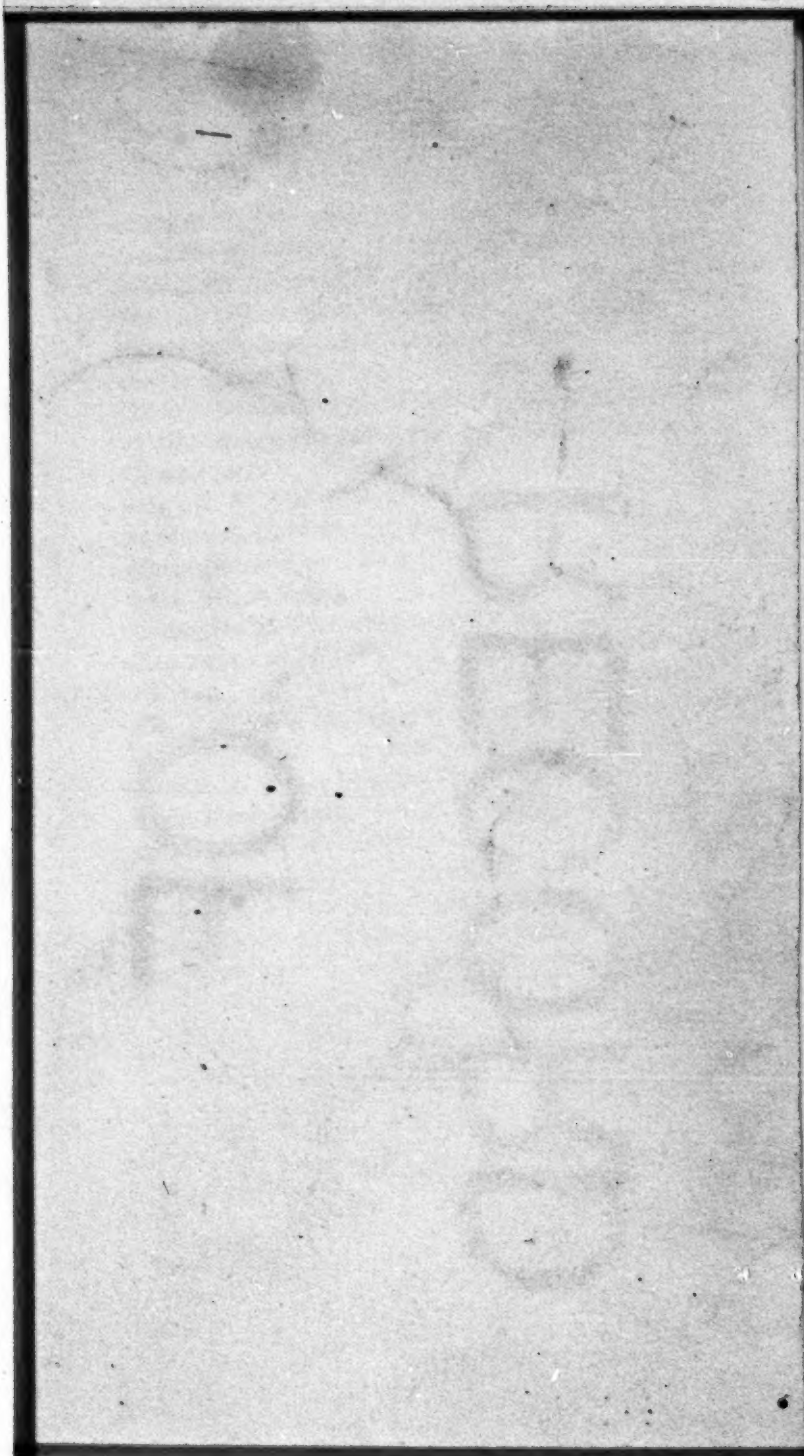

ZAHN ET AL. v. INTERNATIONAL PAPER CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 72-888. Argued October 16, 1973—Decided December 17, 1973

Multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional amount for suits in federal courts, and in this diversity class action under Fed. Rule Civ. Proc. 23 (b)(3) by owners of lakeshore property charging respondent with polluting the lake, where only the named plaintiffs but not the unnamed plaintiffs could show damages in the jurisdictional amount, a class action is not maintainable. Each plaintiff in a Rule 23 (b)(3) class action must satisfy the jurisdictional amount and any plaintiff who does not must be dismissed from the case. *Snyder* v. *Harris*, 394 U. S. 332, followed. Pp. 292-302.

469 F. 2d 1033, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 302.

Peter F. Langrock argued the cause and filed a brief for petitioners.

Taggart Whipple argued the cause for respondent. With him on the brief were *Richard E. Nolan*, *William H. Levit, Jr.*, *Nicholas R. Weiskopf*, and *George W. Ray, Jr.**

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioners, asserting that they were owners of property fronting on Lake Champlain in Orwell, Vermont,

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**Norman Redlich* and *Stanley Buchsbaum* filed a brief for the city of New York as *amicus curiae* urging affirmance.

brought this action in the District Court on behalf of a class consisting of themselves and 200 lakefront property owners and lessees. They sought damages from International Paper Co., a New York corporation, for allegedly having permitted discharges from its pulp and paper-making plant, located in New York, to flow into Ticonderoga Creek and to be carried by that stream into Lake Champlain, thereby polluting the waters of the lake and damaging the value and utility of the surrounding properties. The suit was brought as a diversity action, jurisdiction assertedly resting on 28 U. S. C. § 1332 (a)(1). The claim of each of the named plaintiffs was found to satisfy the $10,000 jurisdictional amount, but the District Court was convinced "to a legal certainty" that not every individual owner in the class had suffered pollution damages in excess of $10,000. Reading *Snyder* v. *Harris*, 394 U. S. 332 (1969), as precluding maintenance of the action by any member of the class whose separate and distinct claim did not individually satisfy the jurisdictional amount and concluding that it would not be feasible to define a class of property owners each of whom had more than a $10,000 claim, the District Court then refused to permit the suit to proceed as a class action. 53 F. R. D. 430 (Vt. 1971). A divided Court of Appeals affirmed, 469 F. 2d 1033 (CA2 1972), principally on the authority of *Snyder* v. *Harris*, *supra*. We granted the petition for writ of certiorari, 410 U. S. 925 (1973).

The Court of Appeals correctly held that this case is governed by the rationale of this Court's prior cases construing the statutes defining the jurisdiction of the District Court. We therefore affirm its judgment.

From the outset, Congress has provided that suits between citizens of different States are maintainable in the district courts only if the "matter in controversy"

exceeds the statutory minimum, now set at $10,000. 28 U. S. C. § 1332 (a).[1] The same jurisdictional-amount requirement has applied when the general federal-question jurisdiction of the district courts, 28 U. S. C. § 1331 (a), is sought to be invoked.[2] A classic statement of the dichotomy that developed in construing and applying

[1] The section provides in pertinent part that:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

"(1) citizens of different States . . . ."

Section 11 of the First Judiciary Act of 1789 set the jurisdictional amount in diversity suits at $500. 1 Stat. 78. In 1801, Congress lowered the requirement to $400 in the Midnight Judges Act, 2 Stat. 89, 92, but it was quickly restored to $500 the following year. 2 Stat. 132. The jurisdictional-amount requirement remained fixed at this level until the Act of Mar. 3, 1887, 24 Stat. 552, when it was raised to $2,000. The figure was subsequently increased by $1,000 by the Act of Mar. 3, 1911, § 24, 36 Stat. 1091. See S. Rep. No. 388, 61st Cong., 2d Sess., pt. 2, pp. 30–32 (1910); H. R. Rep. No. 818, 61st Cong., 2d Sess. (1910); Conference Report, S. Doc. No. 848, 61st Cong., 3d Sess. (1911); 45 Cong. Rec. 3596–3599 (1910); 46 Cong. Rec. 4002, 4003, 4004 (1911).

The current $10,000 jurisdictional amount, codified in 28 U. S. C. § 1332 (a), was enacted by the Act of July 25, 1958, 72 Stat. 415. The legislative history discloses that the change was made "on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all substantial controversies where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies." S. Rep. No. 1830, 85th Cong., 2d Sess., 3–4 (1958); see also *id.*, at 21; H. R. Rep. No. 1706, 85th Cong., 2d Sess., 3 (1958).

[2] Section 1331 (a) provides:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

these sections is found in *Troy Bank* v. *G. A. Whitehead & Co.*, 222 U. S. 39, 40–41 (1911):

> "When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount."

This distinction and rule that multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement for suit in the federal courts were firmly rooted in prior cases dating from 1832,[3] and have continued to be the accepted construction

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[3] The following are representative of innumerable cases confirming this principle: *Woodside* v. *Beckham*, 216 U. S. 117 (1910); *Waite* v. *Santa Cruz*, 184 U. S. 302, 328–329 (1902); *Wheless* v. *St. Louis*, 180 U. S. 379, 382 (1901); *Bernards Township* v. *Stebbins*, 109 U. S. 341, 355 (1883). Cf. *Clay* v. *Field*, 138 U. S. 464 (1891); *Russell* v. *Stansell*, 105 U. S. 303 (1882); *Seaver* v. *Bigelows*, 5 Wall. 208 (1867); *Stratton* v. *Jarvis*, 8 Pet. 4 (1834); *Oliver* v. *Alexander*, 6 Pet. 143 (1832).

Snyder v. *Harris*, 394 U. S. 332 (1969), noted that the judicial interpretation of "matter in controversy" to bar aggregation of separate and distinct claims dated back to at least *Oliver* v. *Alexander*, which is representative of the unbroken line of decisions of this Court interpreting our appellate jurisdiction when that jurisdiction was confined to review of lower court decisions in which the "matter in dispute" exceeded a designated monetary amount. Consistently, plaintiffs with separate and distinct claims could not aggregate their respective "matters in dispute" to bring an appeal to this Court. See, *e. g.*, *Stewart* v. *Dunham*, 115 U. S. 61, 64–65 (1885) (and cases cited therein). The original *Alexander* construction of our appellate jurisdiction was applied to the jurisdictional-amount requirement for federal trial courts in *Walter* v. *Northeastern R. Co.*, 147 U. S. 370, 373 (1893):

"Is the plaintiff entitled to join [all his actions] in a single suit

of the controlling statutes, now §§ 1331 and 1332.[4] The rule has been applied to forbid aggregation of claims where none of the claimants satisfies the jurisdictional amount, as was the case in *Scott* v. *Frazier*, 253 U. S. 243, 244 (1920), for example, where the Court stated the rule to be that "the amount in controversy must equal the jurisdictional sum as to each complainant." *Id.*, at 244. It also requires dismissal of those litigants whose claims do not satisfy the jurisdictional amount, even though other litigants assert claims sufficient to invoke the jurisdiction of the federal court. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939); *Stewart* v. *Dunham*, 115 U. S. 61, 64–65 (1885); *Bernards Township* v. *Stebbins*, 109 U. S. 341, 355 (1883).

In *Clark* v. *Paul Gray, Inc.*, decided after the effective date of the Federal Rules of Civil Procedure in 1938, the Court applied the familiar rule that "when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount . . . , and . . . those amounts cannot be added together to satisfy jurisdictional requirements." 306 U. S., at 589. Upon ascertaining on its own motion that only one of the plaintiffs in the District Court had presented a claim satisfying the

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in a Federal court, and sustain the jurisdiction by reason of the fact that the total amount involved exceeds $2,000? We think not. It is well settled in this court that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained in the court of original jurisdiction, or on appeal in this court, as to those whose claims exceed the jurisdictional amount; and that when two or more defendants are sued by the same plaintiff in one suit the test of jurisdiction is the joint or several character of the liability to the plaintiff."

[4] *Rogers* v. *Hennepin County*, 239 U. S. 621 (1916); *Title Guaranty Co.* v. *Allen*, 240 U. S. 136 (1916); *Pinel* v. *Pinel*, 240 U. S. 594, 596 (1916); *Scott* v. *Frazier*, 253 U. S. 243, 244 (1920); *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939).

jurisdictional amount, the Court reached the merits of that claim but directed the District Court to dismiss the claims of all other plaintiffs for want of jurisdiction.

The same rules were applied to class actions contemplated by Fed. Rule Civ. Proc. 23. The spurious class action authorized by Rule 23 (a)(3), as it stood prior to amendment in 1966,[5] was viewed by Judge Frank, writing for himself and Judges Learned and Augustus Hand, as "in effect, but a congeries of separate suits so that each claimant must, as to his own claim, meet the jurisdictional requirements." *Steele* v. *Guaranty Trust Co. of N. Y.*, 164 F. 2d 387, 388 (CA2 1947).[6] The direct precedent

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[5] Rule 23 (a)(3) provided:

"If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

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"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

[6] "The spurious class suit was a permissive joinder device. . . .

"There was no jural relationship between the members of the class; unlike, for example, the members of an unincorporated association, they had taken no steps to create a legal relationship among themselves. They were not fellow travelers by agreement. The right or liability of each was distinct. The class was formed solely by the presence of a common question of law or fact. When a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in the litigation, which might or might not be accepted. It was an invitation and not a command performance." 3B J. Moore, Federal Practice ¶ 23.10 [1], pp. 2601–2603 (2d ed. 1969).

Professor Moore thus recognized that the jurisdictional-amount requirements governing the joinder of separate and distinct claims applied to spurious class suits:

"These principles applied with equal force in the class action, since the class actions as constituted under original Rule 23 were but

for *Steele* was a 1941 decision in the same circuit expressed in an opinion written by Judge Charles Clark, who, as a member of and Reporter for the advisory committee, was a principal architect of the Federal Rules of Civil Procedure. That case, *Hackner* v. *Guaranty Trust Co. of N. Y.*, 117 F. 2d 95 (CA2 1941), involved a class action brought on behalf of plaintiffs with separate and distinct claims. Judge Clark invoked a long line of authority in this Court, and in other courts, to hold that among parties related only by a common question of law and fact, "aggregation is improper" and that jurisdiction cannot be supplied for those without claims in the requisite amount "by adding a plaintiff who can show jurisdiction." *Id.*, at 98. (Citations omitted.) This was the accepted view in the federal courts with respect to class actions.[7] In consequence, district courts were to

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procedural devices to permit some to prosecute or defend an action without the necessity of all appearing as plaintiffs or defendants." *Id.*, ¶ 23.13, p. 2957.

[7] *Alfonso* v. *Hillsborough County Aviation Authority*, 308 F. 2d 724 (CA5 1962); *Troy* v. *McCart*, 238 F. 2d 289 (CA5 1956); *Hughes* v. *Encyclopaedia Britannica*, 199 F. 2d 295 (CA7 1952); *Ames* v. *Mengel Co.*, 190 F. 2d 344 (CA2 1951); *Miller* v. *National City Bank of New York*, 166 F. 2d 723 (CA2 1948); *Matlaw Corp.* v. *War Damage Corp.*, 164 F. 2d 281 (CA7 1947); *Sturgeon* v. *Great Lakes Steel Corp.*, 143 F. 2d 819 (CA6 1944); *Black & Yates, Inc.* v. *Mahogany Assn.*, 129 F. 2d 227 (CA3 1942); *Woerter* v. *Orr*, 127 F. 2d 969 (CA10 1942); *Central Mexico Light & Power Co.* v. *Munch*, 116 F. 2d 85 (CA2 1940); *Independence Shares Corp.* v. *Deckert*, 108 F. 2d 51, 53 (CA3 1939), rev'd on other grounds, 311 U. S. 282 (1940); *Ames* v. *Chestnut Knolls, Inc.*, 159 F. Supp. 791 (Del. 1958); *Air Line Dispatchers Assn.* v. *California Eastern Airways*, 127 F. Supp. 521 (ND Cal. 1954); *Goldberg* v. *Whittier Corp.*, 111 F. Supp. 382 (ED Mich. 1953); *Schuman* v. *Little Bay Constr. Corp.*, 110 F. Supp. 903 (SDNY 1953); *Giesecke* v. *Denver Tramway Corp.*, 81 F. Supp. 957 (Del. 1949); *Koster* v. *Turchi*, 79 F. Supp. 268 (ED Pa.) aff'd, 173 F. 2d 605 (CA3 1948); *Shipley* v. *Pittsburgh & L. E. R. Co.*, 70 F. Supp.

entertain the claims of only those class action plaintiffs whose individual cases satisfied the jurisdictional amount requirement.

The meaning of the "matter in controversy" language of § 1332 as it applied to class actions under Rule 23 reached this Court in *Snyder* v. *Harris*, *supra*, the occasion being a division of opinion in the courts of appeals as to whether the 1966 amendments to Rule 23 had changed the jurisdictional-amount requirement of § 1332 as applied to class actions involving separate and distinct claims.[8] None of the named plaintiffs and

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870, 873, 874–875 (WD Pa. 1947); *Long* v. *Dravo Corp.*, 6 F. R. D. 226 (WD Pa. 1946); *Scarborough* v. *Mountain States Tel. & Tel. Co.*, 45 F. Supp. 176 (WD Tex. 1942); *Stevenson* v. *City of Bluefield*, 39 F. Supp. 462 (SD W. Va. 1941).

[8] The Court of Appeals for the Fifth Circuit held that there had been no change in the rule. *Alvarez* v. *Pan American Life Insurance Co.*, 375 F. 2d 992, cert. denied, 389 U. S. 827 (1967). The same result was reached in the Eighth Circuit in *Snyder* v. *Harris*, 390 F. 2d 204, 205 (1968), but a contrary ruling developed in the Tenth Circuit, *Gas Service Co.* v. *Coburn*, 389 F. 2d 831, 833–834 (1968). We granted the petitions for certiorari in the latter two cases and decided them together. *Snyder* v. *Harris*, 394 U. S. 332 (1969).

In *Snyder*, the named plaintiff was a shareholder of an insurance company who brought a diversity suit against the company's board of directors on behalf of herself and approximately 4,000 other shareholders. Although Mrs. Snyder's claim totaled only $8,740 in damages, she defended the motion to dismiss for lack of jurisdiction on the ground that if all 4,000 potential claims were aggregated, the amount in controversy would well exceed $10,000. The District Court held that the claims could not be aggregated, and the Court of Appeals affirmed. In the consolidated case, *Gas Service Co.* v. *Coburn*, a customer of petitioner public utility brought a diversity suit on behalf of himself and 18,000 other similarly situated consumers, alleging the illegal collection of a city franchise tax. The single named plaintiff's damages amounted to only $7.81, but the District Court allowed all the claims to be aggregated to satisfy

none of the unnamed members of the class before the Court alleged claims in excess of the requisite amount. It was nevertheless urged that in class action situations, particularly in light of the 1966 amendments to the rule, aggregation of separate and distinct claims should be permitted. The Court was of a contrary view, holding that class actions involving plaintiffs with separate and distinct claims were subject to the usual rule that a federal district court can assume jurisdiction over only those plaintiffs presenting claims exceeding the $10,000 minimum specified in § 1332. Aggregation of claims was impermissible, and the federal court was without jurisdiction where none of the plaintiffs presented a claim of the requisite size. The Court unmistakably rejected the notion that the 1966 amendments to Rule 23 were intended to effect, or effected, any change in the meaning and application of the jurisdictional-amount requirement insofar as class actions are construed.

"The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or of any rule of procedure. That doctrine is based rather upon this Court's interpretation of the statutory phrase 'matter in controversy.' The interpretation of this phrase as precluding aggregation substantially predates the 1938 Federal Rules of Civil Procedure. . . . Nothing in the amended Rule 23 changes this doctrine. . . . The fact that judgments under class actions formerly classified as spurious may now have the same effect as claims brought under the joinder provisions is certainly no reason to treat

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the jurisdictional-amount requirement. The Court of Appeals affirmed.

them *differently* from joined actions for purposes of aggregation." 394 U. S., at 336–337.

The Court also refused to reconsider its prior constructions of the "matter in controversy" phrase, concluding that it should not do so where Congress, with complete understanding of how the courts had construed the statute, had not changed the governing language and down through the years had continued to specify and had progessively increased the jurisdictional amount necessary for instituting suit in the federal courts.

None of the plaintiffs in *Snyder* v. *Harris* alleged a claim exceeding $10,000, but there is no doubt that the rationale of that case controls this one. As previously indicated, *Snyder* invoked the well-established rule that each of several plaintiffs asserting separate and distinct claims must satisfy the jurisdictional-amount requirement if his claim was to survive a motion to dismiss. This rule plainly mandates not only that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims more than $10,000 but also requires that any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.

This follows inescapably from the Court's heavy reliance on *Clark* v. *Paul Gray, Inc.*, *supra*, where only one of several plaintiffs had a sufficiently large claim and all other plaintiffs were dismissed from the suit.[9] Moreover,

[9] The dissent recognizes that *Clark* requires the dismissal of any named plaintiff in an action whose case does not satisfy the jurisdictional amount. But, apparently unnamed members of the class would enjoy advantages not shared by the named plaintiffs since their separate and distinct cases would be exempted from the jurisdictional-amount requirement. Why this should be the case and how this squares with *Clark* or with *Snyder* v. *Harris* are left unex-

the Court cited with approval the decision in *Alvarez* v. *Pan American Life Insurance Co.*, 375 F. 2d 992 (CA5), cert. denied, 389 U. S. 827 (1967), which was decided after the 1966 amendments to Rule 23 and which involved a class action with only one member of the class having a claim sufficient to satisfy § 1332. Only that claim was held within the jurisdiction of the District Court.

We conclude, as we must, that the Court of Appeals in the case before us accurately read and applied *Snyder* v. *Harris*: [10] Each plaintiff in a Rule 23 (b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—"one plaintiff may not ride in on another's coattails." 469 F. 2d, at 1035.

Neither are we inclined to overrule *Snyder* v. *Harris* nor to change the Court's longstanding construction of the "matter in controversy" requirement of § 1332. The Court declined a like invitation in *Snyder* v. *Harris* after surveying all relevant considerations and concluding that to do so would undermine the purpose and intent of Congress in providing that plaintiffs in diversity cases must present claims in excess of the specified jurisdictional amount. At this time, we have no good reason to disagree with *Snyder* v. *Harris* or with the historic construction of the jurisdictional statutes, left undisturbed by Congress over these many years.

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plained. We simply apply the rule governing named plaintiffs joining in an action to the unnamed members of a class, as *Snyder* v. *Harris* surely contemplated.

[10] The inevitability of this conclusion was suggested by the dissent in *Snyder* v. *Harris*, 394 U. S., at 343 (Fortas, J., dissenting). The same result was reached in *City of Inglewood* v. *City of Los Angeles*, 451 F. 2d 948, 952–954 (1971), by the Court of Appeals for the Ninth Circuit.

It also seems to us that the application of the jurisdictional-amount requirement to class actions was so plainly etched in the federal courts prior to 1966 that had there been any thought of departing from these decisions and, in so doing, of calling into question the accepted approach to cases involving ordinary joinder of plaintiffs with separate and distinct claims, some express statement of that intention would surely have appeared, either in the amendments themselves or in the official commentaries. But we find not a trace to this effect. As the Court thought in *Snyder* v. *Harris*, the matter must rest there, absent further congressional action.[11]

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The Court holds that, in a diversity suit, a class action under Rule 23 (b)(3) of the Federal Rules of Civil Procedure is maintainable only when every member of the class, whether an appearing party or not, meets the $10,000 jurisdictional-amount requirement of 28 U. S. C. § 1332 (a). It finds this ruling compelled by the "rationale of this Court's prior cases construing the statutes defining the jurisdiction of the District Court." I disagree and respectfully dissent.

[11] Because a class action invoking general federal-question jurisdiction under 28 U. S. C. § 1331 would be subject to the same jurisdictional-amount rules with respect to plaintiffs having separate and distinct claims, the result here would be the same even if a cause of action under federal law could be stated, see *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 98–101 (1972), or if substantive federal law were held to control this case. Of course, Congress has exempted major areas of federal-question jurisdiction from any jurisdictional-amount requirements, see 28 U. S. C. §§ 1333–1334, 1336–1340, 1343–1345, 1347–1358, 1361–1362, the exemption being so widely applicable, in fact, that the Court in *Snyder* v. *Harris*, 394 U. S., at 341, discounted the impact of its holding in federal cases.

The jurisdictional-amount provision of § 1332 (a) tersely states that "the matter in controversy [must exceed] the sum or value of $10,000 . . . ." Those words, substantially unchanged since the passage of the Judiciary Act of 1789,[1] apply to "civil actions," and say nothing about the requirements applicable to individual claimants and individual claims. Although Congress has several times altered the amount required,[2] generally upward,[3] it has left the task of defining those requirements to the judiciary.[4] The result has been a relatively

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[1] Section 11, 1 Stat. 78. The First Judiciary Act used the term "matter in dispute," *ibid.*, and that phrase was retained until 1911, when the jurisdictional amount was increased from $2,000 to $3,000, Act of Mar. 3, 1911, § 24, 36 Stat. 1091, and the words "matter in controversy" were substituted.

[2] The amendments are catalogued in n. 1 of the Court's opinion.

[3] Adjustments for changes in the purchasing power of the dollar generally have been given as the explanation for this phenomenon. See, *e. g.*, S. Rep. No. 1830, 85th Cong., 2d Sess., 4 (1958):

"The present requirement of $3,000 has been on the statute books since 1911 and obviously the value of the dollar in terms of its purchasing power has undergone marked depreciation since that date. The Consumers Price Index for moderate income families in large cities indicates a rise of about 152 percent since 1913, shortly after the present $3,000 minimum was established. . . . Accordingly the committee believes that the standard for fixing jurisdictional amounts should be increased to $10,000."

See H. R. Rep. No. 1706, 85th Cong., 2d Sess., 3 (1958) (containing identical language). The only decrease, in 1801, is discussed in n. 1 of the Court's opinion.

[4] The only recent suggestion of congressional purpose is an oft-repeated statement in the legislative history of the 1958 amendments:

"The recommendations of the Judicial Conference [of the United States] regarding the amount in controversy, which this committee approves, is based on the premise that the amount should be fixed at a sum of money that will make jurisdiction available *in all substantial controversies* where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to

complex and sensitive set of rules designed to implement Congress' broad directive in a way that is responsive to the demands of fairness and efficiency in adjudication.

One "bright line" has emerged to control all § 1332 actions: there must be at least one plaintiff, or joint interest, seeking more than the statutory amount. *Snyder* v. *Harris*, 394 U. S. 332 (1969); *Troy Bank* v. *G. A. Whitehead & Co.*, 222 U. S. 39 (1911). The "long-standing" and "well established" rule on aggregation of claims that the Court invokes was developed to determine whether a group of claims was sufficiently interrelated to constitute such a "joint" claim or "common and undivided interest." [5]

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convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies." (Emphasis added.)

S. Rep. No. 1830, *supra*, at 3–4; H. R. Rep. No. 1706, *supra*, at 3 (containing identical language).

[5] See *Troy Bank* v. *G. A. Whitehead & Co.*, 222 U. S. 39 (1911), and cases cited in n. 2 of the Court's opinion. The Court also observes, quite correctly, that the same rule on aggregation has been applied to the federal-question jurisdiction, 28 U. S. C. § 1331. But the assertion, in the Court's final footnote, that the same jurisdictional rules it announces for § 1332 will apply to § 1331, is even more questionable than its application of those rules in this case. The continued need for exercise of diversity jurisdiction, at least where a showing of prejudice is not made, has been challenged by respected authorities. See Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 234–240 (1948); Currie, The Federal Courts and the American Law Institute (pts. I & II), 36 U. Chi. L. Rev. 1, 268 (1968, 1969). Cf. S. Rep. No. 1830, *supra*, n. 3. But a sharply different view has been taken of the federal-question jurisdiction, and the Court has reflected that view in its decisions upholding the exercise of jurisdiction over pendent claims under state law. See *Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966). Similarly significant disincentives to assertion of federal rights in federal forums are likely if claimants are barred from combining to reduce the time and cost of litigation.

Once jurisdiction has attached to the "action," however, the "aggregation" rule has been but one of several ways to establish jurisdiction over additional claims and parties. In this case, the claims of the named plaintiffs provided the District Court with jurisdiction over the diversity action. And petitioners make no argument inconsistent with the Court's holding that the theory of "joint" claims or interests will not support jurisdiction over the nonappearing members of their class. Their contention is rather that a second theory, ancillary jurisdiction, supports a determination that those claims may be entertained.

Ancillary jurisdiction to adjudicate claims that cannot be fitted within the aggregation rules has long been recognized by this Court, see *Freeman* v. *Howe*, 24 How. 450 (1861); *Phelps* v. *Oaks*, 117 U. S. 236 (1886); *Wichita R. & Light Co.* v. *Public Utilities Comm'n*, 260 U. S. 48 (1922). But, as one commentator has pointed out, the rules developed to control the exercise of that jurisdiction cannot be explained by "any single rationalizing principle." C. Wright, Federal Courts § 9, p. 21 (2d ed. 1970). They are instead accommodations that take into account the impact of the adjudication on parties and third persons, the susceptibility of the dispute or disputes in the case to resolution in a single adjudication, and the structure of the litigation as governed by the Federal Rules of Civil Procedure.[6]

[6] See Fraser, Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts, 33 F. R. D. 27 (1963); H. Hart & H. Wechsler, The Federal Courts and the Federal System 1075–1081 (2d ed. 1973). Professor Kaplan, the Reporter for the 1966 amendments, has articulated his expectation that Rule 23 would be similarly accommodated:

"New rule 23 alters the pattern of class actions; subdivision (b)(3), in particular, is a new category deliberately created. Like other innovations from time to time introduced into the Civil Rules,

After consideration of these factors, the Court has sustained the exercise of ancillary jurisdiction over compulsory counterclaims under Rule 13 (a), *Horton* v. *Liberty Mutual Insurance Co.*, 367 U. S. 348 (1961), aff'g 275 F. 2d 148 (CA5 1960); *Moore* v. *New York Cotton Exchange*, 270 U. S. 593 (1926). It has also done so where a party's intervention was held to be a matter of right, as is now provided by Rule 24 (a), *Phelps* v. *Oaks*, *supra*; see 2 W. Barron & A. Holtzoff, Federal Practice & Procedure § 593 (C. Wright ed. 1961). Following this lead, the courts of appeals have sustained ancillary jurisdiction over cross-claims permitted by Rule 13 (g), *R. M. Smythe & Co.* v. *Chase National Bank*, 291 F. 2d 721 (CA2 1961); *Childress* v. *Cook*, 245 F. 2d 798 (CA5 1957); over impleaded defendants under Rule 14, *Pennsylvania R. Co.* v. *Erie Avenue Warehouse Co.*, 302 F. 2d 843 (CA3 1962); and over defendants interpleaded under Rule 22, *Walmac Co.* v. *Isaacs*, 220 F. 2d 108 (CA1 1955). See Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874 passim (1958).[7]

Class actions under Rule 23 (b)(3) are equally appropriate for such treatment. There are ample assurances,

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those as to class actions change the total situation on which the statutes and theories regarding subject matter jurisdiction are brought to bear."

Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 399–400 (1967).

[7] See also 7 C. Wright & A. Miller, Federal Practice & Procedure § 1756, pp. 564–565 (1972), approving as sound and "a natural corollary to other applications of the ancillary jurisdiction concept," a holding that only one representative party need meet the jurisdictional-amount requirement to support a class action in *Lesch* v. *Chicago & Eastern Illinois R. Co.*, 279 F. Supp. 908 (ND Ill. 1968).

in the provisions of the rule that "the questions of law or fact common to the members of the class [must] predominate over any questions affecting only individual members," [8] to guarantee that ancillary jurisdiction will not become a facade hiding attempts to secure federal adjudication of nondiverse parties' disputes over unrelated claims. And the practical reasons for permitting adjudication of the claims of the entire class are certainly as strong as those supporting ancillary jurisdiction over compulsory counterclaims and parties that are entitled to intervene as of right. Class actions were born of necessity.[9] The alternatives were joinder of the entire class, or redundant litigation of the common issues. The cost to the litigants and the drain on the resources of the judiciary resulting from either alternative would have been intolerable. And this case presents precisely those difficulties: approximately 240 claimants are involved, and the issues will doubtless call for extensive use of expert testimony on difficult scientific issues.

It is, of course, true that an exercise of ancillary jurisdiction in such cases would result in some increase in the federal courts' workload, for unless the class action is permitted many of the claimants will be unable to obtain any federal determination of their rights. But that objection is applicable to every other exercise of ancil-

[8] Rule 23 (b) (3). The provision further states:
"The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

[9] See 3B J. Moore, Federal Practice ¶¶ 23.02 [1], 23.05 passim (2d ed. 1969).

lary jurisdiction. It should be a sufficient answer that denial of ancillary jurisdiction will impose a much larger burden on the state and federal judiciary as a whole, and will substantially impair the ability of the prospective class members to assert their claims.

If the State provides a class action device comparable to Rule 23 (b)(3), some of this inefficiency and unfairness may be avoided, but certainly not all. The named plaintiffs, and any other members of their class who can meet the jurisdictional-amount requirement, may choose to litigate those claims in the district courts, as these plaintiffs have shown to be their preference. Moreover, they will probably now be required separately to litigate the common issues in their cases,[10] thus possibly enlarging the federal judiciary's burden, and ironically reversing the Court's apparent purpose.

Moreover, if the State does not provide a Rule 23 (b)(3) device, litigation of the claims of class members who either lack the jurisdictional amount or simply prefer to litigate their claims in the state courts—as they would be free to do under any construction of the jurisdictional requirement—will produce a multitude of suits. And the chief influence mitigating that flood—the fact that many of these landowners' claims are likely to be worthless because the cost of asserting them on a case-by-case basis will exceed their potential value—will do no judicial system credit.

Not only does the practical desirability of sustaining ancillary jurisdiction bring Rule 23 (b)(3) class actions within the logic of our decisions, but the Court has long

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[10] This is the probable consequence of the District Court's determination, after holding that each class member had to meet the jurisdictional-amount requirement, that it could find "no appropriate class over which [it had] jurisdiction." 53 F. R. D. 430, 433 (Vt. 1971); see *infra*, at 311–312.

since recognized that fact, and has sustained ancillary jurisdiction over the nonappearing members in a class action who do not meet the requirements of traditional rule of complete diversity laid down in *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806). In *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U. S. 356 (1921), the Court not only held that only the original named plaintiffs and defendants had to satisfy the diversity requirements, but it also stated that intervention by nondiverse members of the class would not destroy the District Court's jurisdiction. *Id.*, at 366. Particularly in view of the constitutional background on which the statutory diversity requirements are written, see *Zahn* v. *International Paper Co.*, 469 F. 2d 1033, 1038 (CA2 1972) (Timbers, J., dissenting), it is difficult to understand why the practical approach the Court took in *Supreme Tribe of Ben-Hur* must be abandoned where the purely statutory "matter in controversy" requirement is concerned.

Certainly this result is not compelled by *Snyder* v. *Harris*, 394 U. S. 332 (1969), for that decision turned solely on whether federal diversity jurisdiction could be established over the "action." Nor can I accept the Court's contention that *Snyder*'s citation to *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939), controls here. That case dealt only with the jurisdictional-amount requirements for the original named plaintiffs who litigated the case. Here petitioners clearly meet that requirement. *Snyder*'s characterization of *Clark* as a class action did not turn that case into a precedent for applying the jurisdictional-amount requirements to nonappearing class members who, so far as the Court indicated in *Clark*, were not even involved in that case.

It would be far more consistent with *Clark* for the Court to rule, as it did in *Supreme Tribe of Ben-Hur*, that only the original named plaintiffs must meet the jurisdictional requirements, and that nonappearing class mem-

bers and intervenors need not. Such a ruling, while going a step farther than petitioners seek, would be reasonable and pragmatically justified. There is a substantial difference between the impact on a case of an appearing party and a nonappearing class member, and intervention poses no threat since the district courts are given discretion by Rule 23 (d)(3) to permit intervention subject to appropriate conditions. See 3B J. Moore, Federal Practice ¶ 23.73 (3), p. 1441 (2d ed. 1969). The question in this case is not whether the class action must be permitted, but whether the District Court has the power to determine whether to permit it, taking into account the elaborate guidance and discretion provided by Rule 23.

The Court also appears to rely on *Snyder*'s rejection of "the notion that the 1966 amendments to Rule 23 were intended to effect, or effected, any change in the meaning and application of the jurisdictional amount requirement insofar as class actions are construed." *Ante*, at 299. *Snyder* based this rejection on Rule 82's admonition that the Federal Rules of Civil Procedure are not to be "construed to extend or limit the jurisdiction of the United States district courts . . . ." Reliance on Rule 82 was proper there because the petitioner contended that the restructuring of Rule 23 to abolish "spurious" class actions in favor of a "functional" approach, that took into account the nature of the litigation and its effects, undercut this Court's long line of decisions establishing the minimum requirements for diversity jurisdiction over a "civil action."

But this case presents no suggestion that the 1966 amendments override the Court's decisions construing § 1332. There are no earlier decisions construing the jurisdictional-amount requirements for the nonappearing members of a "spurious" class, probably because the old Rule did not bind members of the class unless they

affirmatively requested inclusion.[11] Nor did the 1966 amendments bring Rule 23 (b)(3) class actions within any other holdings. If anything, they merely made the determination whether the class should be permitted to turn more directly on the kinds of concerns that have motivated the exercise of ancillary jurisdiction.[12]

The question in this case ought, instead, to be whether changes in the Civil Rules may affect, and be affected by, the determination whether to exercise existing jurisdiction. Of course, they must. As the Reporter to the Advisory Committee on Civil Rules that prepared the 1966 amendments has observed, "[f]rom the start the Civil Rules, elaborating and complicating actions through joinder of claims and parties, have profoundly influenced jurisdictional result."[13] The Court's prior decisions upholding novel exercises of ancillary jurisdiction have made liberal use of the opportunities presented by the Civil Rules and amendments of them, and Rule 82 has stood as no bar to that action.

Indeed, the effects of today's decision will also be influenced by the form of Rule 23. The District Court, after ruling that ancillary jurisdiction could not be exercised, was confronted with a dilemma that did not exist prior to the 1966 amendments: identification of the members of the class that would be bound by the decision so that they could be provided the required notice.[14] After

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[11] See Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 941–942 and cases cited n. 493 (1958).

[12] See Rules 23 (a)(1), (2), (3) and (b)(3)(A), (B), (C). Cf. H. Hart & H. Wechsler, *supra*, n. 6, at 1078. ("Under the revised rule, which contemplates that in a class action all members of the class not properly excluded will be bound by the judgment, the 'spurious' class action no longer exists, and ancillary jurisdiction may support intervention by class members in all cases.")

[13] Kaplan, *supra*, n. 6, at 400.

[14] Rules 23 (c)(2), (3).

determining that it was not possible to determine which of the 240 proposed members met the $10,000 requirement, the court denied class action status to all. But few, if any, Rule 23 (b)(3) classes will lend themselves to a determination, on the basis of the pleadings, that each proposed member meets that requirement. Intervention, at least for the purpose of establishing jurisdiction, may be necessary, and that is more than even the old Rule contemplated when it specified that class members had to request inclusion in order to be bound.

Thus, on the basis of the Court's implicit holding that ancillary jurisdiction would not support recognition of a Rule 23 (b)(3) class, the 1966 amendments will still influence the number of cases in which federal jurisdiction will be exercised. They will, as in this case, simply curtail the exercise of jurisdiction rather than expand it. In view of the Court's previous concern with practical realities in both its cases involving class actions and its cases involving the exercise of ancillary jurisdiction, I think that this limitation is both unwarranted and unwise.